(1)

No. 04-

IN THE

Supreme Court of the United States

JULIA CRUZ, AS REPRESENTATIVE OF JOSE S. CRUZ,

Petitioner,

v.

BLUE CROSS BLUE SHIELD OF ILLINOIS, A DIVISION OF HEALTH CARE SERVICE CORPORATION, A MUTUAL LEGAL RESERVE COMPANY; AND BLUE CROSS BLUE SHIELD ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Federal Employees Health Benefits Act's ("FEHBA") jurisdictional provision (5 U.S.C. § 8912), which expressly limits federal court jurisdiction to claims brought against the United States, should be expanded by creating federal common law, as the Seventh Circuit did here, to include claims brought by a private carrier against its insureds, where doing so directly conflicts with four Circuit Court decisions and cannot be reconciled with this Court's precedent.

Whether FEHBA's preemption provision (5 U.S.C. § 8902(m)(1)), which states, in relevant part, that contract terms relating to "coverage or benefits (including payments with respect to benefits) . . . preempt any State or local law . . . which relates to health insurance or plans", applies here, as the Seventh Circuit held, to create federal question jurisdiction, where plan contract terms relating to "coverage or benefits" were not at issue, where no state or local laws relating to health insurance or plans were at issue, and where the Seventh Circuit's decision directly conflicts with a Second Circuit decision and this Court's preemption jurisprudence.

Whether federal common law should be created and applied pursuant to FEHBA to resolve a dispute between private parties involving an insurance carrier's reimbursement claim against an insured's personal injury recovery, where a state court action was already proceeding on the issue, where Congress omitted any such right of action in FEHBA, where the document relied on was prepared and issued by a private carrier, and where the Seventh Circuit's decision creating such law directly conflicts with a Second Circuit decision, which held that a FEHBA-carrier's reimbursement claim brought against an insured's third-party recovery did not warrant creating federal common law.

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Julia Cruz as Representative of Jose S. Cruz respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals is published as *Blue Cross Blue Shield of Illinois et al. v. Cruz*, 396 F.3d 793 (7th Cir. 2005). The Seventh Circuit's denial of Petition for Reconsideration and Rehearing *en banc* is unreported. The district court's memorandum and order granting petitioner's motion to dismiss is unreported, but can be found at *Blue Cross Blue Shield of Illinois et al. v. Cruz*, 2003 WL 22715815 (N.D. Ill. Nov. 17, 2003). *See*, Appendices A - C.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The Seventh Circuit's opinion was rendered on January 24, 2005 (App. A). The Petition for Panel Rehearing with suggestion for Rehearing *En Banc* was denied on March 8, 2005. (App. C).

STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 8902(m)(1):

> The provisions of any contract under this chapter which relate to the nature or extent of coverage or benefits (including payments with respect to

benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans to the extent that such law or regulation is inconsistent with such contractual provisions.

5 U.S.C. § 8903(1):

The Office of Personnel Management may contract for or approve the following health benefits plans: (1) Service Benefit Plan. — One Government-wide plan, which may be underwritten by participating affiliates licensed in any number of States, offering two levels of benefits, under which payment is made by a carrier under contracts with physicians, hospitals, or other providers of health services for benefits of the types described by section 8904(1) of this title given to employees, annuitants, members of their families, former spouses, or persons having continued coverage under section 8905a of this title, or, under certain conditions, payment is made by a carrier to the employee, annuitant, family member, former spouse, or person having continued coverage under section 8905a of this title.

5 U.S.C. § 8904(a):

The benefits to be provided under plans described by section 8903 of this title may be of the following types: (1) Service Benefit Plan. —(A) Hospital Benefits. (B) Surgical benefits. (C) In-hospital medical benefits. (D) Ambulatory

patient benefits. (E) Supplemental benefits. (F) Obstetrical benefits.

5 U.S.C. § 8912:

> The district courts of the United States have original jurisdiction, concurrent with the United States Court of Federal Claims, of a civil action or claim against the United States founded on this chapter.

STATEMENT OF THE CASE

This case arises from a third-party recovery that Petitioner Jose S. Cruz ("Petitioner" or "Cruz") obtained in connection with injuries sustained in a May 9, 1998 automobile accident (the "accident")[1]. Cruz retained an attorney, Gerald Eisen & Associates, Ltd., and together they obtained a $30,000 recovery from the tortfeasor who caused the accident. Respondents, Blue Cross Blue Shield of Illinois and Blue Cross Blue Shield Association ("Respondents" or "Blue Cross"), who did not assist in obtaining the recovery, asserted a reimbursement lien against the recovery in the amount of $4,682.20, the amount of medical benefits Blue Cross purportedly paid on behalf of Cruz in connection with the accident.

The parties' dispute began when Blue Cross refused to pay a *pro rata* share of the costs (i.e., the attorneys fees) that Cruz incurred in obtaining the third-party recovery as

[1] Petitioner Jose S. Cruz died in April 2002, and his widow, Julia Cruz, as his Special Administrator, has agreed to proceed with this action and the parallel state court action.

required by the common fund doctrine.[2] Despite being a beneficiary of Cruz's recovery, Blue Cross insists that the common fund doctrine does not apply because the health plan insuring Cruz is governed by federal law, the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. § 8901 *et seq.*, and because the statement of benefits document Cruz received does not require it to reduce its reimbursement lien pursuant to the common fund doctrine. The Statement of Benefits was written and issued by Blue Cross to Cruz and other FEHBA participants.[3]

As explained below, the gravamen of this case is whether Blue Cross's reimbursement lien, which it pursued in federal court after it unsuccessfully removed Cruz's pending state court action, implicates federal subject matter jurisdiction pursuant to FEHBA or federal common law. FEHBA's text and legislative history are silent on subrogation and reimbursement, and states that its preemption and enforcement powers are limited to coverage and benefit determinations and only where the United States is a defendant. The Seventh Circuit's holding, that federal jurisdiction exists over a private insurance carrier's reimbursement claim against an insured, rests on an overly expansive interpretation of FEHBA's narrow scope and affords federal jurisdiction even where the health plan

[2] "The common fund doctrine rests upon the perception that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched." *Bishop v. Burgard*, 198 Ill.2d 495, 509 (2002) (*citing Boeing v. Van Gemert*, 444 U.S. 472, 478 (1980)).

[3] According to a December 2002 report by the United States General Accounting Office, approximately 8.3 million individuals were covered by FEHBA-governed health plans.

document was issued by Blue Cross, not the United States, and where the money at issue does not come directly from the federal treasury or otherwise directly affects it, but rather from a private third-party tortfeasor. That decision does not reconcile with this Court's precedents and has been squarely rejected by the Second Circuit, and is at odds with other Circuit Court decisions.

A. Ancillary Parallel State Court Proceedings

Failing to reach resolution with Blue Cross over its reimbursement lien, Cruz joined two other individuals in filing a class action suit in Illinois state court on October 10, 2000, asserting state claims that sought to have Blue Cross reduce its reimbursement lien pursuant to Illinois' common fund doctrine. *Doyle, Carrizal and Cruz v. Blue Cross Blue Shield of Illinois*, No. 00 CH 14182 (Cir. Ct. of Cook County, Ill., Chancery Div.). That action is on-going as to Cruz's individual and class claims only.[4]

Blue Cross, on October 31, 2000, removed Cruz's state court action to federal court, asserting that Cruz's state law claims were preempted under FEHBA and federal common law. On June 1, 2001, the district court rejected Blue Cross's bases for federal jurisdiction and remanded Cruz's state action, finding that neither FEHBA nor federal common law provided Blue Cross federal jurisdiction over the parties' dispute. *Doyle et al. v. Blue Cross Blue Shield of Illinois*, 149 F. Supp. 2d 427 (N.D. Ill. 2001) (Hon. Joan Gottschall, U.S.D.J.).

[4] William Doyle and Luis Carrizal were participants in non-FEHBA governed health plans and settled their claims against Blue Cross.

On August 27, 2004, the U. S. Department of Justice filed in Cruz's state court action a "Statement of Interest of the United States of America" in connection with the state court's consideration of the parties' cross-motions for summary judgment. In its brief, the United States described its relationship with Blue Cross, explaining that Blue Cross, not the Government, had sole authority over reimbursement decisions, stating:

> Medicare is a health insurance program maintained and underwritten by the Federal Government itself, in which carriers and fiscal intermediaries act as agents of the Government and perform functions that would otherwise be performed by the Government. In contrast, *FEHBA carriers do not perform outsourced governmental tasks, are not agents of the Government, and do not act on behalf of OPM. Rather, they function as independent economic entities that offer and run their own health insurance plans, performing a role that is not governmental in nature but, instead, is akin to their activities as insurers in the private-sector marketplace.* An extension of the principle in the cases cited by BCBS beyond the Medicare context to the FEHBA context would be unwarranted and would distort OPM's relationship with BCBS. [Emphasis added].

After requesting and considering briefs on the issue of whether it could proceed despite the Seventh Circuit's January 25, 2005 decision, the state court, on February 25, 2005, decided that it could and granted, in part, Cruz's motion for summary judgment and denied Blue Cross's cross-motion. Since then, Cruz has been proceeding ahead on his class claims.

B. Proceedings In The District Court

On December 21, 2001, over a year after Cruz filed his state court suit, Blue Cross filed this parallel action against Cruz in federal court asserting a claim for "Breach of Obligations under FEHBA Plan", alleging that Cruz's failure to reimburse Blue Cross from his third-party recovery justified its federal cause of action under FEHBA, the Service Benefit Plan document Blue Cross provided Cruz, and federal common law.

On November 14, 2003, the district court granted Cruz's motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim. (App. B) (Hon. Amy St. Eve, U.S.D.J.). The court held that "FEHBA only creates a cause of action if the United States is a party" and "[g]iven that the United States is not a party to this dispute" federal jurisdiction under FEHBA does not exist. (App. B, 24a). The district court also refused Blue Cross's invitation to create federal common law to provide jurisdiction, holding that any "possible impact" Blue Cross's reimbursement will have on the Federal Treasury is insufficient, Congress's uniformity goal did not cover carrier reimbursement disputes, and FEHBA's preemption provision was limited to "coverage or benefits", which was not implicated by a carrier's reimbursement claims against a beneficiary's third party tort recovery. (App. B, 26a-29a).

C. Proceedings In The Seventh Circuit

On January 24, 2005, the Seventh Circuit reversed the district court's dismissal, holding that (1) "FEHBA's jurisdictional provision for suits against the United States is not automatically a bar to federal jurisdiction" and allows

carriers to bring federal actions against insureds (App. A, 6a-7a), (2) FEHBA preempts the area of carrier reimbursement claims because such a claim "relates to the nature, provision, or extent of coverage or benefits" (App. A, 9a-11a), and (3) federal common law should be created pursuant to the test promulgated by this Court in *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988), because "the impact of reimbursement on the federal treasury creates a significantly federal interest" and "the federal policy of uniform healthcare benefits for FEHBA plan enrollees is in conflict with state law." (App. A, 11a-12a). On March 8, 2005, the Seventh Circuit denied Cruz's Petition for Rehearing with Suggestion for Rehearing *En Banc*. On May 5, 2005, the Seventh Circuit denied Blue Cross's motion to enjoin Cruz's pending state court action.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING THE SCOPE OF FEHBA's JURISDICTIONAL PROVISION WHICH EXPRESSLY LIMITS FEDERAL JURISDICTION TO DISPUTES BROUGHT AGAINST THE UNITED STATES

A. The Seventh Circuit's Decision Improperly Expands FEHBA's Express Jurisdictional Reach.

Where a federal statute expressly limits district court jurisdiction, that limitation is "strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *See Great-West Life v. Knudson*, 534 U.S. 204, 209 (2002) (emphasis in original) (*citing Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1993)).

Congress, in enacting FEHBA, expressly limited district court jurisdiction to "a civil action or claim *against the United States* founded on this chapter." 5 U.S.C. § 8912. (Emphasis supplied). A plain reading of this specific statutory language clearly shows that FEHBA does not create a private right of action for a health insurer to sue one of its members.

The Seventh Circuit ignored FEHBA's express and clear jurisdictional limitation without providing any specific grounds for doing so, other than to state that the provision "is not automatically a bar to federal jurisdiction over actions brought against other parties." (App. A, 6a). However, had Congress intended for federal courts to have jurisdiction over all civil actions arising under FEHBA, it could have easily provided for exclusive jurisdiction of all claims arising under that legislation (as it did when enacting, among others, ERISA legislation), and not limited jurisdiction solely to claims against the United States. The Seventh Circuit's holding ignores a plain reading of FEHBA's jurisdictional provision, *see Bread Political Action Committee, et al. v. Federal Election Commission*, 455 U.S. 577, 580 (1982) ("Jurisdictional statutes are to be construed with precision and with fidelity to the terms by which Congress has expressed its wishes'")[5], and violates this Court's instruction to not expand federal court powers "by judicial decree". *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994); *Finley v. United States*, 490 U.S. 545, 547 (1989) ("courts which are created by law, and whose

[5] *See also City of Kenosha, Wisconsin et al. v. Bruno*, 412 U.S. 507, 513 (1973) (holding no federal jurisdiction existed over civil rights action against municipalities because the Court found that "the legislative history" and "the language actually used by Congress" did not "bring municipal corporations within the ambit of §1983.").

jurisdiction is defined by written law, cannot transcend that jurisdiction.").

The Seventh Circuit's expansive interpretation of FEHBA here conflicts with an analogous situation addressed by this Court in *Finley*. In *Finley*, a widow sought to amend her federal action against the United States, brought under the Federal Tort Claims Act ("FTCA"), to add state law claims against non-federal parties. 490 U.S. at 546-47. In declining jurisdiction over non-federal parties, this Court held that the text of the FTCA, which provides that "the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States", 28 U.S.C. § 1346(b), "means against the United States and no one else." *Id.* at 552.[6]

The text of the FTCA's and FEHBA's jurisdictional provisions are substantially the same and, thus, the Seventh Circuit erred in judicially expanding FEHBA's reach. *Cf.* 28 U.S.C. § 1346(b), *with* 5 U.S.C. § 8912. Indeed, allowing Blue Cross to sue a plan member in federal court under FEHBA requires an extremely liberal interpretation of FEHBA's jurisdictional provision which Congress clearly did not intend. *See Finley*, 490 U.S. at 552 (indicating that if Congress wanted to, it could have easily worded the statute to broaden its reach beyond only actions against the United States).

[6] *See also United States v. Sherwood*, 312 U.S. 584 (1941) (holding that suits under the Tucker Act, 28 U.S.C. § 1346(a)(2), can only be brought in federal court and only against the United States).

B. The Seventh Circuit Conflicts With Numerous Other Circuits Which Hold That FEHBA's Jurisdictional Provision Does Not Create Federal Jurisdiction For Carriers To Sue Insureds In Federal Court For Reimbursement.

The Seventh Circuit's decision squarely conflicts with the holdings of numerous other courts that have decided that FEHBA § 8912 limits federal court jurisdiction to disputes against the United States. *See Empire Healthchoice Assurance, Inc. v. McVeigh*, 396 F.3d 136, 145 (2d Cir. 2005) (hereinafter, "*Empire I*") ("§ 8912 does demonstrate that Congress considered jurisdictional issues in enacting FEHBA and did not hesitate expressly to confer federal jurisdiction where it found it necessary to do so."); *Botsford v. Blue Cross & Blue Shield of Mont.*, 314 F.3d 390, 398-99 (9th Cir. 2002) ("we conclude that Congress intended to limit suits over benefits under a FEHBA plan to only one defendant: United States."); *Goepel v. Ntl. Postal Mail Handlers Union*, 36 F.3d 306, 307 (3d Cir. 1994) (remanding insured's suit against insurer because, among other reasons, "the United States is not a party to this action."); *Howard v. Group Hospital Svc.*, 739 F.2d 1508, 1511 (10th Cir. 1984) (holding that district court lacked federal jurisdiction on claims brought by FEHBA plan insured against insurer because "the United States here acts as the agent, not the insurer of health benefits."). *Accord Ramirez v. Humana, Inc.*, 119 F. Supp. 2d 1307, 1312 (M.D. Fla. 2000) (acknowledging jurisdiction under FEHBA is limited to suits against the United States); *Mooney v. Blue Cross of Western Penn.*, 678 F. Supp. 565, 566 (W.D. Pa. 1988) ("[i]f Congress had intended . . . district courts to have jurisdiction over private actions by [FEHBA] plan participants against plan providers, we believe it would have explicitly stated so.").

In each of the foregoing decisions, the courts strictly construed FEHBA's jurisdictional provision, limiting federal court power under FEHBA to disputes against the United States. The Second Circuit, which expressly rejects the Seventh Circuit's decision on each of the issues raised in this Petition, *see Empire Healthchoice Assurance, Inc. v. McVeigh*, 402 F.3d 107, 110 (2d Cir. Mar. 16, 2005) (hereinafter, "*Empire II*")

> we note our disagreement with the conclusions reached in *Blue Cross and Blue Shield of Illinois v. Cruz*, 396 F.3d 793 (7th Cir. 2005), which the Seventh Circuit decided ten days after we issued our original decision in *Empire*. The *Cruz* court rested its holding on arguments that we addressed and squarely rejected in our original opinion.

reviewed the FEHBA statute and the regulations promulgated by the United States Office of Personnel Management ("OPM"), the agency charged with negotiating and regulating health benefits plans for federal employees, and found that the FEHBA regulation requiring that "denial of health benefits must be brought against OPM and not against the carrier or carrier's subcontractors, 5 C.F.R. § 890.107, supports limiting federal jurisdiction to only suits by beneficiaries against OPM. *Empire I*, 396 F.3d at 145 fn. 7. The OPM's lack of regulations "opening federal courts to insurance carriers seeking reimbursement from beneficiaries" is, as the Second Circuit acknowledged, significant of what Congress did not intend. *Id.*

The Eighth Circuit's *Medcenters Health Care, Inc. v. Ochs*, 26 F.3d 865 (8th Cir. 1994), is the only other Circuit decision allowing a plan's reimbursement claim brought

under FEHBA against an insured to be heard in federal court. The Eighth Circuit's decision emphasizes the wide divide which exists amongst the Circuit's and the need for this Court's review.

II. REVIEW IS NECESSARY TO RESOLVE A CONFLICT CONCERNING THE APPLICATION OF FEHBA's PREEMPTION PROVISION, AND TO ESTABLISH FEHBA's PREEMPTION REACH

A. The Seventh Circuit's Decision Does Not Comport With Congress's Intent To Limit Application Of FEHBA's Preemption Provision.

The Seventh Circuit, as it did in construing FEHBA's jurisdictional limitation, ignored FEHBA's express preemption limitations in ruling that federal jurisdiction exists over Blue Cross's reimbursement lien. FEHBA's preemption provision states that it only applies as follows:

> The terms of any [FEHBA] contract . . . which relate to the nature, provision or extent of coverage or benefits (including payments with respect to benefits) shall supercede and preempt any State or local law . . . which relates to health insurance or plans.

5 U.S.C. § 8902(m)(1).

The Seventh Circuit's first error was its conclusion that a FEHBA contract is at issue in this case. Blue Cross filed suit against Cruz in federal court based upon reimbursement language contained in a Statement of Benefits that it prepared and issued to FEHBA plan enrollees. The OPM merely

authorizes the distribution of that document and, as the United States conceded in Cruz's state court action, Blue Cross acts independently in enforcing this provision. *See Doe v. Devine*, 703 F.2d 1319, 1333 fn. 62 (D.C. Cir. 1983) (stating that "OPM can negotiate, but cannot 'impose', contract terms."). No express terms of the OPM/Blue Cross contract, a separate document from the Statement of Benefits, is at issue in this case. Thus, the Seventh Circuit overextended FEHBA's preemption reach. *See Lingle v. Magic Chef, Inc.*, 486 U.S. 399, 407 (1988) (declining to preempt state tort law under LMRA, where claim did not require interpretation of collective bargaining agreement).

The Seventh Circuit next erred in concluding that the reimbursement language it relied upon related to "coverage or benefits (including payments with respect to benefits)". The Seventh Circuit distorted the plain meaning of "coverage or benefits" under FEHBA in defining a carrier's reimbursement lien as part of the "net benefits" an enrollee receives from the carrier. (App. A., 9a). The Seventh Circuit's strained interpretation was made without any reference to the description of benefits under FEHBA or its legislative history. The Seventh Circuit's position stretches FEHBA's "relate to" clause further than Congress intended and distorts the meaning of "benefits" under FEHBA, and is based upon a tenuous, indirect connection between money paid by the plan and a recovery received from a third-party. The Court's rationale — that a plan's reimbursement reduces the "benefit" provided to the insured — ignores the fact that carrier benefit determinations and payments are completed long before reimbursements are asserted and recovered.

A plain reading of the FEHBA statute and its legislative history — which does not mention subrogation or

reimbursement— shows no direct connection exists linking "coverage or benefits" with Congressional intent to apply preemption here, and that no material link or relation should be implied.

1. *FEHBA's statutory scheme shows that "Benefits", as described under FEHBA, do not include reimbursements against third-party recoveries*

Section 8903 of FEHBA identifies four types of health benefit plans that OPM may contract for or approve. 5 U.S.C. § 8903. Plaintiff was a member of the Service Benefit Plan, which is described in subsection 8903(1). That subsection, like the other three, refer to FEHBA section 8904 to describe the "benefits" covered under each plan. Section 8904, titled "Types of benefits", states, in relevant part:

> (a) The benefits to be provided under plans described by section 8903 of this title may be of the following types:
>
> (1) Service Benefit Plan. —
>
> (A) Hospital benefits.
>
> (B) Surgical benefits.
>
> (C) In-hospital medical benefits.
>
> (D) Ambulatory patient benefits.
>
> (E) Supplemental benefits.
>
> (F) Obstetrical benefits.

It is clear that this FEHBA section, which provides guidance on Congress's intent regarding the scope of the word "benefits", does not encompass a private carrier's reimbursement claim against an insured.

2. *FEHBA's legislative history further shows that Congress did not intend to preempt areas involving reimbursement*

In 1977, Congress amended FEHBA to add the preemption provision at issue here, § 8902(m)(1). Contrary to the Seventh Circuit's decision, the primary goal of FEHBA's preemption provision was not to provide private insurers with additional sources of cash flow at the detriment of injured federal employees, or "federalize" every issue that an OPM-authorized FEHBA plan confronts. Rather, the provision's legislative history shows that Congress's intent was to prevent States from encroaching on true coverage and benefit determinations, not on situations, like here, involving reimbursements from third-party tort recoveries:

> Some States have established health insurance requirements that conflict with the provisions of the FEHB contracts, such as **requiring recognition of certain practitioners** not covered by Federal employee's health benefits plans.
>
> * * *
>
> The effect of this amendment is to preempt application of State laws or regulations which **specify types of medical care, providers of care, extent of benefits, coverage of family members,**

> **age limits for family members**, or other matters relating to health benefits or coverage . . .

H.R. Rep. No. 95-282, at 3-4 (1977) (emphasis supplied).

In a letter from the United States Civil Service Commission ("USCSC"), the predecessor of OPM, to Congress, which was attached to House Report No. 95-282, the USCSC acknowledged the narrowness of FEHBA's preemption scope:

> **It is a form of limited preemption.**
>
> * * *
>
> more and more **States have legislated the kinds of benefits and medical practitioners that carriers doing business in these States must cover**. These laws in effect presented serious problems from the standpoint of the uniformity of benefits under the program. It also placed carriers in serious jeopardy of loss of their license in a State unless they were to **approve pay for a benefit not provided under our contract but required by State law**.

Id. at 6 (emphasis supplied).

In 1998, Congress amended FEHBA's preemption provision to broaden its reach over benefits and coverage issues by merely deleting the phrase "to the extent that such law or regulation is inconsistent with the provisions of the Federal employees' health benefits contract". 5 U.S.C. § 8902(m)(1) (1997). Significantly, Congress, in amending the provision, did not delete the limiting phrase "coverage

or benefits". The legislative history of this amendment, which was part of the passage of the Federal Employees Health Care Protection Act of 1997, further shows that the amended preemption provision still solely focuses on preventing State laws addressing benefits and coverage issues that were surviving under the old provision.

> **These changes would affect states that have requirements governing what types of organization can provide health care** when those requirements are different from those under federal contracts. This preemption would be considered a mandate under UMRA. However, because **the only effect of the preemption would be to limit the application of state law in some circumstances**, CBO estimates that any costs to state or local governments arising from this mandate would be minimal.

S. Rep. No. 105-257, pt. V (1998) (emphasis supplied).

Congress's limited expansion of the statute to capture other pure benefit and coverage issues is seen in its description of the amendment as "technical changes", *Id.* at pt. I, and in other legislative commentary. *See* H.R. Rep. No. 105-374, pt. 2, at p. 9 (1998) ("For example, a carrier's effort to establish a preferred provider organization (PPO) across the country would not be jeopardized by State-mandated 'any willing provider' statutes.").

The aforementioned review of the text and legislative history of FEHBA's preemption provision shows that the Seventh Circuit violated this Court's standard for applying preemption statutes. *See CSX Transportation v. Easterwood*,

507 U.S. 658, 664 (1993) (holding that courts should only preempt when it is the "clear and manifest purpose of Congress" to do so).

Finally, the Seventh Circuit erred in applying FEHBA preemption because there is no specific state law relating to health insurance that conflicts with Blue Cross's right to reimbursement. Illinois does not have an anti-subrogation or anti-reimbursement law, and the Seventh Circuit expressly declined Blue Cross's request to enjoin Cruz's state common fund claims against Blue Cross, which is a law of general application not specifically targeted to health insurance or plans. *See Mackey et al. v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 833 (1988) (refusing to preempt "run-of-the-mill state law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan . . . [even though these suits] obviously affect[] and involv[e] ERISA plans and their trustees").

B. The Seventh Circuit's Decision Creates A Conflict As To Whether FEHBA's Preemption Provision Creates Federal Subject Matter Jurisdiction Over Carrier Reimbursement Claims.

The Seventh Circuit's holding that FEHBA preempts state reimbursement law (App. A. at 8a-11a), directly conflicts with the Second Circuit's *Empire I and II* holdings, 396 F.3d 136, 145-49, *petition for rehearing denied*, 402 F.3d 107, 109-110, which rejected all of the same arguments raised by Blue Cross and accepted by the Seventh Circuit here. The Second Circuit's *Empire* decision found no indication from the statute's words or its legislative history "that Congress meant to channel into federal courts the business of resolving, pursuant to judicially fashioned federal

common law, the range of contract claims relating to" a plan's reimbursement lien pursued against an insured's third-party tort recovery. *Empire I*, 396 F.3d at 149 (*citing American Airlines, Inc. v. Wolens*, 513 U.S. 219, 232 (1995) (rejecting carrier's argument that Airline Deregulation Act barred state breach of contract claim)).[7]

The Second Circuit also parted with the Seventh Circuit on holding that FEHBA preemption only exists where there is a "showing that the dispute implicates a specific state law or state common-law principle 'relating to health insurance'". *Id.* at 145-46 fn 10 (finding no such conflict existed, further stating: "[i]f Congress had not wished to limit the types of state laws subject to preemption, it could have quite easily

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[7] Notably, the Second Circuit was troubled by FEHBA's preemption provision allowing "contract terms" to preempt state law because, as it believed, "only federal law may preempt state and local law". *Empire I*, 396 F 3d at 143 ("[t]he constitutionality of federal preemption is . . . grounded in the Supremacy Clause of the Constitution, which provides that '*the Laws of the United States* . . . shall be the supreme Law of the Land'") (*emphasis in original*). The Second Circuit stated that the "FEHBA-authorized contracts . . . are not" federal laws because "the government does not impose contract terms as it would impose a law, [r]ather, the OPM negotiates the contract terms privately with insurance providers . . . who are under no obligation to enter into the contracts in the first place." *Id.* at 144 (distinguishing contracts and tariffs by recognizing that a "tariff, required by law to be filed, is not a mere contract, [i]t is the law"; *citing, Evanns v. AT&T Corp.*, 229 F.3d 837, 840 fn 9 (9th Cir. 2000)). Despite its reservations about the constitutionality of FEHBA's preemption provision, the Second Circuit narrowly construed the provision instead of invalidating it, making clear though that its construction required that the federal law preempting state law may be federal common law or the FEHBA statute provisions themselves, but it must be law — not contract terms. *Id.* at 145.

provided that 'federal law shall govern the interpretation and enforcement of contract terms'"). The Seventh Circuit should have held similarly because, like in *Empire*, there is no specific state law relating to health insurance that conflicts with Blue Cross's right to reimbursement.

Finally, the Second Circuit, contrary to the Seventh Circuit here, rejected reliance on "ERISA-based precedent." *Empire I*, 396 F.3d at 147-48. The Seventh Circuit erroneously relied on its own previous ERISA decisions that allowed federal jurisdiction over ERISA plan reimbursement claims against insureds, reasoning that "if Congress intended to preempt state law when regulating private employers, it would be strange to leave regulation to the individual states when the employer is the United States itself". (App. A, 10a-11a) (*citing Admin. Comm. of the Wal-Mart Stores, Inc. v. Varco*, 338 F.3d 680, 687-89, 691 (7th Cir. 2003)). The Seventh Circuit's reasoning, however, ignores this Court's decision declining to find federal jurisdiction over ERISA plan reimbursement claims, *see Great West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), as well as other circuit court decisions finding the same (including at least one within the Seventh). *See Primax Recoveries Inc. v. Sevilla*, 324 F.3d 544, 549 (7th Cir. 2003) (affirming dismissal of ERISA plan's reimbursement claim); *Bauhaus USA, Inc. v. Copeland*, 292 F.3d 439 (5th Cir. 2002); *Community Health Plan of Ohio v. Mosser*, 347 F.3d 619 (6th Cir. 2003). The Second Circuit, in declining to extend ERISA precedent, found ERISA to be "significantly more comprehensive than FEHBA, in that it contains multiple preemption provisions and a detailed civil enforcement scheme intended to completely supplant state law." *Empire I*, 396 F.3d at 147-48 & fn. 13 ("reject[ing] . . . suggestion that we should rely on ERISA-related precedent to determine the preemptive

reach of FEHBA" and recognizing FEHBA's limiting term not found in ERISA's preemption provisions, "which requires that the preempting contract term 'relate to . . . [health] coverage or benefits'").

III. REVIEW IS NECESSARY TO RESOLVE A CONFLICT REGARDING THE CREATION OF FEDERAL COMMON LAW OVER A DISPUTE INVOLVING PRIVATE PARTIES

A. The Seventh Circuit's Creation Of Federal Common Law Conflicts With The Presumption Against Creating Such Law And Violates This Court's *Boyle* Test.

The Seventh Circuit's decision violates this Court's instruction to limit federal common law creation to those "narrow areas . . . concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). The Seventh Circuit's shoehorning Blue Cross's reimbursement claim into the category of "rights and obligations of the United States" (App. A, 11a-12a) was error.

This Court's decision in *Boyle v. United Tech. Corp.*, 487 U.S. 500 (1988), relied upon by the Seventh Circuit, does not support creating federal common law or federal jurisdiction here. Neither prong of *Boyle's* two-part test exists. Indeed, there is no "uniquely federal interest" involved and there is no "significant conflict" between an identifiable "federal policy or interest and the operation of state law". *Boyle*, 487 U.S. 504-07.

The Seventh Circuit's conclusion that the "impact of reimbursement on the federal treasury creates a significant federal interest" and "the federal policy of uniform healthcare benefits for FEHBA plan enrollees is in conflict with state law" (App. A, 11a-12a) is speculative and erroneous. The Seventh Circuit provided no basis for concluding that Blue Cross's reimbursement lien may affect the Federal Treasury. The United States General Accounting Office's ("GAO") December 2002 report, analyzing premium growth in FEHBA plans, does not support the Seventh Circuit's conclusion. In that report, the GAO indicates that most of the increases in FEHBA plan premiums was a result of higher prescription drugs and hospital care expenses. Nowhere in the thirty-one page report and appendixes does it suggest that carrier reimbursements have had or will have a material affect on premiums. Indeed, reimbursements from third-party recoveries is not even mentioned in the report. The Seventh Circuit's decision ignores its own precedent which rejected bald assertions of adverse affects to plans where reimbursement liens are concerned. *See Blackburn v. Sundstrand*, 115 F.3d 493, 496 (7th Cir. 1997) (stating that allowing insureds application of state common fund doctrine to plan reimbursement liens "may even increase the plan recoveries in the long run").

Additionally, the Seventh Circuit's "vague assertions about the need for uniformity" and "generalized pleas for uniformity" are insufficient to support a federal interest. *See Woodward Gov Co., v. Curtiss-Wright Flight Sys., Inc.*, 164 F.3d 123, 129 (2d Cir. 1999) (*citing United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 730 (1979)). Blue Cross's claim against Cruz is based upon the alleged breach of terms contained in the Statement of Benefits, a document written by Blue Cross, and does not involve the breach of a federal

government contract, nor is the United States a party to this action. Unlike in *Boyle*, neither the OPM or the Government mandates the language contained in the Statement of Benefits. *See Boyle*, 487 U.S. at 507 (finding that a uniquely federal interest is established where the "terms of Government contracts . . . specified by the Government" are affected).

B. The Seventh Circuit's Decision Conflicts With Other Circuits Which Hold That Federal Common Law Should Not Be Created Pursuant To FEHBA To Resolve Disputes Between Private Parties.

The Seventh Circuit's decision, relying on *Caudill v. Blue Cross and Blue Shield of North Carolina, Inc.*, 999 F.2d 74 (4th Cir. 1993), to create federal common law under FEHBA, directly conflicts with the Second Circuit's *Empire I and II* decisions (396 F.3d at 138; 402 F.3d at 109 fn2) and with Third and Tenth Circuit opinions. *See Goepel*, 36 F.3d at 314 (criticizing the *Caudill* court's application of the *Boyle* standards) and *Howard*, 739 F.2d at 1511 (rejecting the need to create federal common law under FEBHA regarding a denial of benefit dispute).

The Second Circuit expressly rejected Blue Cross's invitation to engage in "rule-making" because, unlike the Seventh Circuit, it found that Blue Cross's reimbursement action sought to "vindicate its own rights against another private party", *Empire II*, 402 F.3d at 109, and because Blue Cross failed to demonstrate a conflict between a state law and a "uniquely federal interest". *Empire I*, 396 F.3d at 138-39. The Seventh Circuit's reliance on H.R.Rep.No. 105-374, at 9 (1998) for support of Congressional intent to "strengthen the case for trying FEHBA program claims disputes in Federal courts rather than State courts" ignores, as the Second Circuit points out, Congress's narrow goal here, which was to

"displac[e] state and local law '*relating to health insurance or plans*,' and not to generally applicable state law that may have an effect on benefits or coverage in some cases." *Empire I.*, 396 F.3d at 149 fn. 16. (emphasis in original). The Seventh Circuit's decision also ignores the U.S. Government's concession in Cruz's state action, that Blue Cross alone asserts and collects the reimbursement claim.

CONCLUSION

Finally, given that this case raises several circuit splits and important federal concerns, this case is an appropriate one for this Court to address for the first time issues regarding the FEHBA statute. Additionally, the importance of Supreme Court resolution of the numerous conflicts created by the Seventh Circuit is not limited to this case. Aside from the millions of FEHBA participants who are subject to the lower court conflicting decisions, the application of FEHBA in this context is still an open issue in the Second Circuit's Empire decision, given that the court there denied Blue Cross's Petition for Rehearing after the Seventh Circuit denied rehearing here. Moreover, Blue Cross and its counsel are in both this case and the Empire case. It would, therefore, be judicially efficient and fair to all parties involved to grant Cruz's petition here and Blue Cross's petition also, in the likely event it files for review.

Wherefore, petitioners request that this court grant them a writ of certiorari to review the decisions of the courts below, reverse and dismiss for lack of subject matter jurisdiction.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED JANUARY 24, 2005

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 03-4170

BLUE CROSS AND BLUE SHIELD OF ILLINOIS, a Division of Health Care Service Corporation, a Mutual Legal Reserve Company; and BLUE CROSS BLUE SHIELD ASSOCIATION,

Plaintiffs-Appellants,

v.

JULIA CRUZ as Representative of JOSE S. CRUZ,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 01 C 9821—Amy J. St. Eve, *Judge*.

ARGUED OCTOBER 25, 2004—DECIDED JANUARY 24, 2005

Before POSNER, KANNE, and WILLIAMS, Circuit Judges.

KANNE, *Circuit Judge*. JOSE S. CRUZ was injured in a car accident. Cruz's insurer, Blue Cross and Blue Shield of Illinois, a division of Health Care Service Corporation ("Blue Cross"), paid for the treatment of his injuries. Cruz was

enrolled in Blue Cross's Service Benefit Plan provided for government employees and their dependents under the Federal Employees Health Benefits Act ("FEHBA"). Cruz sued the tortfeasor responsible for his injuries and recovered money in excess of his medical expenses in a settlement agreement. Pursuant to the Statement of Benefits in the Service Benefit Plan, Blue Cross filed suit demanding reimbursement for the benefits paid to Cruz. The district court dismissed the suit for lack of subject matter jurisdiction. Because we find that FEHBA preempts state law on this matter, we reverse.

I. History

FEHBA was enacted in 1959 to provide health insurance to federal employees, bridging the gap between the government and private employers with respect to healthcare benefits. The current version of FEHBA (effective in 1998) authorizes the United States Office of Personnel Management ("OPM") to contract with qualified insurance carriers for coverage of federal employees and their dependents under various health benefits plans. OPM contracted with Blue Cross and Blue Shield Association ("Blue Cross Association") to create the Service Benefit Plan, which is administered by Blue Cross in Cruz's home state of Illinois. FEHBA requires that the contracts between insurance carriers and OPM contain a detailed Statement of Benefits including maximums, limitations, and other terms related to benefits. The Statement of Benefits is incorporated into the federal contracts by reference and is the official description of benefits and Plan terms.

Appendix A

The Statement of Benefits in the Service Benefit Plan contains a provision regarding subrogation and right-of-recovery as follows:

> The Plan has the right to recover payments the Plan has made to you or your dependent from a third party or third party's insurer because of illness or injury caused by a third party. In addition to its right of recovery, the Plan is subrogated to you and your dependent's present and future claims against a third party.

The Plan does not include a provision for sharing fees associated with recovery. Under Illinois law, however, the common fund doctrine provides that parties recovering money from a common fund are to share any fees associated with recovery on a pro rata basis.

We now return to the specifics of Cruz's case. Blue Cross paid $4,682.20 in benefits to cover the injuries resulting from his May 9, 1998, car accident. Cruz hired his own attorney to bring the lawsuit, and recovered $30,000 in a settlement agreement. Cruz paid one-third of this amount ($10,000) in attorney's fees.

As mandated by the Service Benefit Plan, Cruz notified Blue Cross of his settlement agreement in March 2000. Cruz and Blue Cross were unable to agree on the amount that Blue Cross should be reimbursed. Cruz believed that the Illinois common fund doctrine should be applied, and thus that Blue Cross was entitled to $3,121.47 and a pro rata reduction for out-of-pocket costs. In April 2000, Blue Cross sent Cruz a

letter demanding $3,500 as its net share of the recovery. In September 2000, Blue Cross sent another letter demanding the total amount of the benefits paid to Cruz, namely, $4,682.20. To date, Blue Cross has not been reimbursed for any benefits paid to Cruz.

On October 10, 2000, Cruz and two other individuals filed a state court action against Blue Cross in the Circuit Court of Cook County, Illinois. Cruz and the other plaintiffs sought recovery against Blue Cross under both the Illinois common fund doctrine and the Illinois Consumer Fraud and Deceptive Practices Act. Blue Cross removed the action to federal court on November 1, 2001. The Northern District of Illinois then granted Cruz's motion to remand the case to state court based on lack of subject matter jurisdiction.

Cruz's suit in state court is still pending. The suit giving rise to this appeal was commenced on December 21, 2001, when Blue Cross and Blue Cross Association filed a complaint in federal court demanding reimbursement for the benefits paid to Cruz. The district court dismissed for lack of subject matter jurisdiction.

Plaintiffs contend on appeal that the district court erred in granting Cruz's motion to dismiss, claiming that subject matter jurisdiction exists because state law is preempted by FEHBA and thus federal common law controls.

II. Analysis

We review a district court's decision as to whether subject matter jurisdiction exists *de novo* and its factual findings for clear error. *See Scott v. Trump Ind., Inc.*, 337 F.3d 939, 942 (7th Cir.2003), *cert. denied*, 124 S.Ct. 940 (2003).

A. The Remand Order

Cruz first argues that the instant suit was improperly filed in the district court because it was really an appeal of the Remand Order sending Cruz's state court action (which had been removed by Blue Cross) back to state court. Such appeals are prohibited under 28 U.S.C. § 1447(d). The district court correctly rejected this argument, stating that "'the [Remand] [O]rder doesn't conclude the issue whether the district court has jurisdiction over [Plaintiffs'] new and materially identical suit.'" *Blue Cross & Blue Shield of Ill. v. Cruz*, No. 01C9821, 2003 WL 22715815, at *4 (N.D.Ill. Nov.17, 2003) (citing *Health Cost Controls of Ill., Inc. v. Washington*, 187 F.3d 703, 708-09 (7th Cir.1999)). On its face, the complaint filed by Blue Cross and Blue Cross Association seeks to hold Cruz liable for reimbursement of benefits paid under a FEHBA contract. Although Cruz is free to assert the Illinois common fund doctrine as a partial defense, it does not control this case, and the Remand Order does not preclude federal subject matter jurisdiction. *See Adkins v. Ill. Cent. R.R. Co.*, 326 F.3d 828, 836 (7th Cir.2003) (jurisdiction is determined by the well-pleaded complaint rule).

B. Cause of Action under FEHBA

Cruz also argues that because FEHBA explicitly creates a cause of action against the United States, it forecloses federal subject matter jurisdiction over actions against any other party. FEHBA does contain a provision granting federal jurisdiction over suits against the United States. 5 U.S.C. § 8912 ("The district courts of the United States have original jurisdiction, concurrent with the United States Court of Federal Claims, of a civil action or claim against the United States founded on this chapter."). Contrary to Cruz's assertion, however, FEHBA's jurisdictional provision for suits against the United States is not automatically a bar to federal jurisdiction over actions brought against other parties. *See Teamsters Nat'l Auto. Transporters Indus. Negotiating Comm. v. Troha*, 328 F.3d 325, 330 (7th Cir.2003) ("[T]he limitation [of the jurisdictional provision of the Labor Management Relations Act] is more aptly described not in terms of parties but in terms of the purpose of a lawsuit.") (citations omitted), *cert. denied*, 540 U.S. 826 (2004).

Under Cruz's theory, the federal courts would never have subject matter jurisdiction over any suits against a private party, including those brought by enrollees against carriers. This position has been rejected by other courts. *See, e.g., Botsford v. Blue Cross & Blue Shield of Mont., Inc.*, 314 F.3d 390, 397-99 (9th Cir.2002) (holding that the district court had jurisdiction over enrollee's claim against carrier because FEHBA preempted state law claim), *amended by* 319 F.3d 1078 (9th Cir.2003); *McCoy v. Unicare Life & Health Ins. Co.*, No. 4C1126, 2004 WL 2358277, at *4-5 (N.D.Ill. Oct.18, 2004) (denying motion to remand malpractice suit brought

by enrollee against carrier to state court because FEHBA completely preempted claim). Cruz cites several FEHBA cases brought against private party defendants that were dismissed because they did not name the United States as defendant, but his reliance is misplaced. In the most recent case cited by Cruz, *Botsford*, the Ninth Circuit actually held that the district court had jurisdiction over the case. *See* 314 F.3d at 398-99. The court's position that the case should be dismissed by the district court on remand is consistent with the interpretation that § 8912 requires an enrollee suing *for benefits* to sue OPM or the United States and not the individual carrier. *See id.* at 398. Other cases cited by Cruz[1] pre-date the 1998 Amendment to FEHBA, which broadened its preemption provision and is discussed below.

C. FEHBA's Preemption Provision

Section 1331 of 28 U.S.C. confers federal question subject matter jurisdiction on cases that arise "under the Constitution, laws, or treaties of the United States." Even if a federal statute does not explicitly create a cause of action, a claim may arise under federal law if the statute completely preempts state law in a particular area. *See* U.S. Const. art. VI, cl. 2; *see also Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 62-64 (1987) (holding that employee's state law claims were preempted by ERISA and were therefore federal causes of action).

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1. *Goepel v. Nat'l Postal Mail Handlers Union*, 36 F.3d 306 (3d Cir.1994); *Mooney v. Blue Cross of W. Pa.*, 678 F.Supp. 565 (W.D.Pa.1988). *But see Ramirez v. Humana, Inc.*, 119 F.Supp.2d 1307 (M.D.Fla.2000).

We start our preemption analysis with the presumption that Congress does not intend to supplant state law. *See N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995). As noted by the Supreme Court, Congress must have shown that its "clear and manifest purpose" was to preempt state law in order to support a finding of federal jurisdiction over fields such as health insurance contracts that are traditionally regulated by the states. *Id.* at 655 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

The starting point in assessing Congress's intent is the text of the statute in question. *See, e.g., Time Warner Cable v. Doyle*, 66 F.3d 867, 875 (7th Cir.1995). FEHBA does have an explicit preemption provision. The language of the preemption provision is as follows:

> The terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans.

5 U.S.C. § 8902(m)(1) (2000).

In this case, Blue Cross and Blue Cross Association have filed a complaint demanding reimbursement for benefits paid pursuant to the Statement of Benefits, part of the FEHBA-authorized Service Benefit Plan contract. The FEHBA preemption provision dictates that the contract terms trump

state law when they relate to the nature, provision, or extent of coverage or benefits including payments with respect to benefits. Whether there is federal subject matter jurisdiction, then, depends on whether the reimbursement provision of the Statement of Benefits "relates to" the nature, provision, or extent of coverage or benefits.

The Supreme Court interpreted the words "relate to" in the context of the ERISA preemption provision in *Travelers*. 514 U.S. 645 (1995). As the Court pointed out, if "relate to" were taken to its furthest literal interpretation, there would be no limit to the preemption provision. *Id.* at 655-56. "Preemption would never run its course, for [r]eally, universally, relations stop nowhere[.]" *Id.* at 655 (internal quotes and citation omitted). An enrollee's reimbursement obligation after recovery from a third party affects the amount of net benefits received from the carrier, so it certainly satisfies the literal definition of being "related to" the extent of coverage or benefits. We therefore must examine the purpose of the preemption provision and of the entire Act to determine whether subrogation rules are within the scope of state law that Congress meant to preempt with FEHBA-created contract terms. *See id.* at 656.

As originally enacted in 1978, § 8902(m)(1) only required federal preemption of state or local laws "to the extent that such law[s] or regulation [s] [were] inconsistent with such contractual provisions." 5 U.S.C. § 8902(m)(1) (1994). Congress broadened the preemption provision in 1998, intending to expand federal jurisdiction over FEHBA claims even when state law does not conflict with FEHBA contract provisions. The broadening of the preemption

provision was meant to "strengthen the ability of national plans to offer *uniform benefits and rates* to enrollees regardless of where they may live." H.R.Rep. No. 105-374, at 9 (1998) (emphasis added). Congress also wanted to "strengthen the case for trying FEHBA program claims disputes in Federal courts rather than State courts." *Id.* Uniform administration and cost-savings were major goals of Congress in initially enacting FEHBA as well. H.R.Rep. No. 86-957, at 1 (1959).

If FEHBA contract provisions do not preempt state law regarding subrogation, the practical effect is that federal employees in different states paying the same premiums would not be required to repay benefits after recovery from third parties according to the same rules. Federal employees in different states would have different reimbursement obligations and hence different net benefits. This is contrary to the uniformity goal of FEHBA in general and its preemption provision in particular. The cost-savings goal of Congress would also be thwarted, because reimbursements from enrollees end up in the federal fund used to pay FEHBA plan premiums. Reimbursements ultimately keep costs down for both the government and enrollees.

Because Congress's clear intent was to make benefits uniform for FEHBA plan enrollees of different states, state law regarding subrogation is preempted by the reimbursement provision in the Service Benefit Plan. We note that the same result has been reached by this court and others when confronted by the subrogation question in the ERISA context. *See Admin. Comm. of the Wal-Mart Stores, Inc. Assocs. Health & Welfare Plan v. Varco*, 338 F.3d 680, 687-89, 691

(7th Cir.2003), *cert. denied*, 124 S.Ct. 2904 (2004); *Arana v. Ochsner Health Plan, Inc.*, 338 F.3d 433, 437-40 (5th Cir.2003) (en banc), *cert. denied*, 540 U.S. 1104 (2004). While ERISA and FEHBA are obviously different statutes, if Congress intended to preempt state law when regulating private employers, it would be strange to leave regulation to the individual states when the employer is the United States itself.[2]

The district court and the parties addressed the question of whether federal common law should be applied in this case under the *Boyle* test. *Boyle* states that federal common law should be created if "uniquely federal interests" are involved and if state law "significantly conflicts" with federal policy or objectives. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1987). We believe that this case satisfies the *Boyle* test: the impact of reimbursement on the federal treasury creates a significantly federal interest, *see, e.g.*, *Caudill v. Blue Cross & Blue Shield of N.C., Inc.*, 999 F.2d 74, 78 (4th Cir.1993), and, as discussed above, the federal policy of uniform healthcare benefits for FEHBA plan enrollees is in conflict with state law. Because we hold that the FEHBA-created contract provision preempts state

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2. We disagree with the district court's view that "FEHBA's preemption provision is much more narrow [than ERISA's]." *Cruz*, 2003 WL 22715815, at *6. As noted by the Ninth Circuit, "[t]he new provision closely resembles ERISA's express preemption provision, and precedent interpreting the ERISA provision thus provides authority for cases involving the FEHBA provision." *Botsford*, 314 F.3d at 393-94; *see also Corporate Health Ins., Inc. v. Tex. Dep't of Ins.*, 215 F.3d 526, 539 (5th Cir.2000), *vacated on other grounds*, 536 U.S. 935 (2002).

subrogation law, however, the *Boyle* analysis is unnecessary. We are not required to imply a "new" cause of action under FEHBA, but simply to "fill in [FEHBA's] interstices with federal common law." *See UIU Severance Pay Trust Fund v. Local Union No. 18-U, United Steelworkers*, 998 F.2d 509, 512 (7th Cir.1993). With no explicit statutory cause of action on which to rely and with state law preempted, Congress's clear intent to have uniform subrogation rules per the terms of the FEHBA-created contract require "a judicially-crafted cause of action." *Id.* at 512-13.

D. The Colorado River *Doctrine*

Finally, we do not believe that the district court could properly accept Cruz's invitation to abstain from exercising jurisdiction in favor of the state court suit under the *Colorado River* doctrine. In *Colorado River*, the Supreme Court held that a federal court may dismiss a suit in exceptional circumstances where there is a concurrent state proceeding. *See Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 818 (1976). The Court set out ten factors to be considered in deciding whether a federal action should be dismissed in favor of a parallel state action:

> 1) whether the state has assumed jurisdiction over property; 2) the inconvenience of the federal forum; 3) the desirability of avoiding piecemeal litigation; 4) the order in which jurisdiction was obtained by the concurrent forums; 5) the source of governing law, state or federal; 6) the adequacy of state-court action to protect the federal plaintiff's rights; 7) the relative progress of state

> and federal proceedings; 8) the presence or absence of concurrent jurisdiction; 9) the availability of removal; and 10) the vexatious or contrived nature of the federal claim.

LaDuke v. Burlington N. R.R. Co., 879 F.2d 1556, 1559 (7th Cir.1989) (citation omitted).

Of these ten factors, "[p]articular weight must be given to the presence of a federal question in the case[.]" *Sverdrup Corp. v. Edwardsville Cmty. Unit Sch. Dist. No. 7*, 125 F.3d 546, 549 (7th Cir.1997). We have already determined that the FEHBA contract provision preempts state law with respect to subrogation, so a federal question does exist in this case. The rest of the *Colorado River* factors also weigh in favor of exercising jurisdiction.

The state court has not assumed jurisdiction over any property, and the federal court in the Northern District of Illinois cannot be more inconvenient for the parties than the state forum (Circuit Court of Cook County). Abstention would not necessarily lead to "piecemeal litigation," because the issue in the state court suit brought by Cruz is whether he is entitled to keep some of the benefits paid to him to offset his attorney's fees, not whether he must reimburse Blue Cross based on the subrogation clause in the Service Benefit Plan. Because there are no compulsory counter-claims in Illinois, *see Wilson v. M.G. Gulo & Assocs., Inc.*, 691 N.E.2d 875, 877-78 (Ill.App.Ct.1998), Blue Cross's claim for the principal amount of reimbursement would not necessarily be resolved in Cruz's state court suit.

Appendix A

The order in which jurisdiction was obtained and the relative progress of the state and federal proceedings might initially seem to favor abstention. Cruz filed his state court action more than a year prior to the commencement of this action. As Blue Cross and Blue Cross Association point out, however, the state court suit is essentially a defense to their claim for reimbursement. We agree that it would be more logical for Cruz to raise his offset claim in response to Blue Cross's and Blue Cross Association's suit for reimbursement as a partial defense. Also, the state suit has been stayed at its preliminary stages, so its progress is not so great as to merit abstention.

The state court action will not adequately protect Blue Cross's and Blue Cross Association's interests, in part because Cruz's state court action seeks to declare illegal the Service Benefit Plan terms regarding subrogation that OPM promulgated. OPM would be unable to participate as a party in a state court suit under 5 U.S.C. § 8912. Resolving the case in federal court would eliminate this potential problem because it would allow OPM to participate in the event that Cruz raises the legality of the contract subrogation provision.

In sum, the *Colorado River* doctrine is to be invoked only in exceptional cases, and this is not such a case. *Sverdrup*, 125 F.3d at 549-50 ("This circuit has recognized consistently that the primary duty of the district court is to exercise the jurisdiction vested in it by law; 'the presumption is against abstention.'") (quoting *Allendale Mut. Ins. Co. v. Bull Data Sys.*, 10 F.3d 425, 430 (7th Cir.1993)).

III. Conclusion

With FEHBA, Congress intended to create cost-efficient and uniform health insurance benefits for employees of the United States and their dependents throughout the country. The Act's express preemption provision dictates that the terms of contracts created under FEHBA preempt state law when such terms are related to benefits and coverage. Congress intended for terms related to subrogation to be included in this realm. Thus, the FEHBA-created contract provision in the Statement of Benefits preempts state law with respect to reimbursement for benefits paid to Cruz. The district court has federal question subject matter jurisdiction over this case under 28 U.S.C. § 1331. Accordingly, we REVERSE the district court's finding to the contrary and REMAND for further proceedings consistent with this opinion.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED NOVEMBER 14, 2003

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 01 C 9821

BLUE CROSS AND BLUE SHIELD OF ILLINOIS, a division of HEALTH CARE SERVICE CORPORATION, A Mutual Legal Reserve Company; and BLUE CROSS AND BLUE SHIELD ASSOCIATION,

Plaintiffs,

v.

JOSE A. CRUZ,

Defendant.

MEMORANDUM OPINION AND ORDER

AMY J. ST. EVE, District Judge:

Plaintiffs Blue Cross and Blue Shield of Illinois, a division of Health Care Service Corporation ("HCSC") and Blue Cross and Blue Shield Association ("BCBSA") filed a one-count complaint against Defendant Jose Cruz for breach of obligations under Cruz's Federal Employees Health

Benefits Act plan. Defendant seeks to dismiss Plaintiff's complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for lack of jurisdiction and failure to state a claim upon which relief can be granted. As discussed below, Defendant's motion is granted.

BACKGROUND

On approximately May 9, 1998, Defendant Cruz was injured in an automobile accident. At the time, Defendant was enrolled in the Service Benefit Plan, one of the federal government's health benefit plans for federal employees and their dependents. The Service Benefit Plan was created by a contract between the United States Office of Personnel Management ("OPM") and BCBSA pursuant to the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. §§ 8901-8914. Pursuant to FEHBA, OPM has the authority to establish federal heath benefit plans and to contract with qualified carriers to execute such plans. *Id.* Plaintiff HCSC is the Blue Cross and Blue Shield entity that administers the Service Benefit Plan in Illinois. Under Plaintiff's contract with OPM, Plaintiff is required to seek reimbursement in appropriate cases where a beneficiary of the plan has recovered from a third party.

FEHBA requires that each contract OPM enters with a service carrier such as HCSC "contain a detailed statement of benefits offered" and "include such maximums, limitations, exclusions, and other definitions of benefits as [OPM] considers necessary or desirable." 5 U.S.C. § 8902(d). FEHBA does not dictate the terms of the statement of benefits or address the issue of subrogation.

Appendix B

I. The Service Benefit Plan

The Statement of Benefits in the Service Benefit Plan contains a subrogation and right-of-recovery provision. That provision provides:

> This subrogation and right of recovery provision applies when you or your dependent are sick or injured as a result of the act or omission of another person or party. The Plan has the right to recover payments the Plan has made to you or your dependent from a third party or third party's insurer because of illness or injury caused by a third party. In addition to its right of recovery, the Plan is subrogated to you and your dependent's present and future claims against a third party. Third party means another person or organization.

The Plan requires beneficiaries to notify it of any third party recoveries and "to reimburse the Plan to the extent of benefits paid by the Plan." It states that "[a]ll recoveries from a third party ... must be used to reimburse the Plan for benefits paid." It informs the beneficiary that "the Plan shall have a lien on the proceeds of [a claim against a third party] in order to reimburse itself to the full amount of benefits it is called upon to pay." With respect to attorneys' fees, it provides: "Any reduction of the Plan's claim for payment of attorney's fees or costs associated with the claim is subject to prior approval by the Plan."

Appendix B

II. Claim Reimbursement

Defendant submitted claims to HCSC for the cost of the treatment he received as a result of his May 1998 accident. In response, HCSC paid $4,682.20 in benefits provided to Defendant under the Service Benefit Plan.

In March 2000, Defendant informed HCSC that he had settled with the third party involved in the May 9, 1998, accident in the amount of $30,000. As set forth in the Service Benefit Plain, Plaintiffs had asserted a lien against any recoveries Defendant Cruz might obtain in connection with the accident. On April 6, 2000, HCSC sent a letter to Cruz through his attorney indicating that it would agree to a reimbursement amount of $3,500 in immediate fulfillment of Defendant's lien obligation. Plaintiff refused to apply the Illinois common fund doctrine or to credit the amount it sought in reimbursement for the attorneys' fees and out-of-pocket costs incurred by Defendant in obtaining recovery from the third party. On September 13, 2000, HCSC sent another letter to Cruz's attorney requesting payment of the full amount of the lien obligation, namely, $4,682.20.

III. State Court Action

On October 10, 2000, Cruz and two other individuals filed a state court action against HCSC in the Circuit Court of Cook County, Illinois. *Doyle, et al. v. Blue Cross Blue Shield of Illinois*, No. 00H14182 (the "State Court Action"). In the State Court Action, Cruz and the other plaintiffs sought recovery against HCSC under the Illinois "common fund" doctrine and under the Illinois Consumer Fraud and

Deceptive Practices Act. On November 1, 2000, HCSC removed the action to federal court. Cruz subsequently filed a motion to remand the action to state court on the basis that the federal court lacked subject matter jurisdiction over the plaintiffs' claims. The federal court granted Cruz's motion and remanded the case to the state court. *See Doyle et al. v. Blue Cross Blue Shield of Illinois,* 149 F.Supp.2d 427 (N.D.Ill.2001) (the "Remand Order").

HCSC and BCBSA subsequently filed this separate action against Defendant Cruz in federal court. Plaintiffs allege that Defendant has breached his obligation under the Service Benefit Plan because he has refused to reimburse HCSC from his settlement proceeds. Plaintiff alleges that Defendant has refused to pay back any amount he received in benefits.

ANALYSIS

I. Legal Standards

Defendant seeks to dismiss this case under both Rule 12(b)(1) for lack of subject matter jurisdiction and Rule 12(b)(6) for failure to state a claim. A Rule 12(b)(1) motion to dismiss tests the federal jurisdiction of a complaint. *See* Fed.R.Civ.P. 12(b)(1). It is well settled that federal jurisdiction is limited to cases of "actual controversy." *Arizonans for Official English v. Arizona,* 520 U.S. 43, 67, 117 S.Ct. 1055, 1069, 137 L.Ed.2d 170 (1997). Plaintiffs bear the burden of proving the existence of subject matter jurisdiction. *Int'l Harvester Co. v. Deere & Co.,* 623 F.2d 1207, 1210 (7th Cir.1980). In analyzing a Rule 12(b)(1)

motion, the Court may look beyond the pleadings. *See Long v. Shorebank Dev. Corp.*, 182 F.3d 548, 554 (7th Cir.1999); *Int'l Harvester Co.*, 623 F.2d at 1210. The Court must accept all well-pleaded factual allegations as true and draw all reasonable inferences in favor of the plaintiff. *Long*, 182 F.3d at 554; *Neiman v. Rudolf Wolff & Co., Ltd.*, 619 F.2d 1189, 1190 (7th Cir.1980).

The purpose of a motion to dismiss under Rule 12(b)(6) is to "test the sufficiency of the complaint, not to decide the merits" of the case. *Triad Associates, Inc. v. Chicago Housing Auth.*, 892 F.2d 583, 586 (7th Cir.1989). When deciding a motion to dismiss pursuant to Rule 12(b)(6), the Court views "the complaint in the light most favorable to the plaintiff, taking as true all well-pleaded factual allegations and making all possible inferences from those allegations in his or her favor." *Lee v. City of Chicago*, 330 F.3d 456, 459 (7th Cir.2003) (citations omitted). Dismissal is appropriate only where it appears beyond doubt that under no set of facts would plaintiff's allegations entitle him to relief. *See Henderson v. Sheahan*, 196 F.3d 839, 846 (7th Cir.1999); *Kennedy v. National Juvenile Detention Ass'n*, 187 F.3d 690, 695 (7th Cir.1999).

II. Federal Jurisdiction

Cruz first challenges the Court's subject matter jurisdiction over this action. "It is axiomatic that a federal court must assure itself that it possesses jurisdiction over the subject matter of an action before it can proceed to take any action respecting the merits of the action. The requirement that jurisdiction be established as a threshold

matter 'springs from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" *Cook v. Winfrey*, 141 F.3d 322, 325 (7th Cir.1998) (quoting *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998)). Under 28 U.S.C. § 1331, federal courts have jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Under the well-pleaded complaint doctrine, "a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63, 107 S.Ct. 1542, 1546, 95 L.Ed.2d 55 (1987) (citations omitted). Therefore, the plaintiff is "master of the complaint." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398-99, 107 S.Ct. 2425, 2433, 96 L.Ed.2d 318 (1987).

III. The Remand Order

Defendant argues that the filing of this case amounts to an "improper review" of the Remand Order. He essentially contends that Plaintiffs' suit constitutes an appeal of the Remand Order which is prohibited under 28 U.S.C. § 1447(d).

Defendant Cruz's state court complaint rested on the Illinois common fund doctrine. Illinois' common fund doctrine "permits a party who creates, preserves, or increases the value of a fund in which others have an ownership interest to be reimbursed from that fund for litigation expenses incurred, including counsel fees." *Scholtens v. Schneider*, 173 Ill.2d 375, 385, 219 Ill.Dec. 490, 671 N.E.2d 657, 662 (1996) (citing *Brundidge v. Glendale Federal Bank, F.S.B.*, 168 Ill.2d

235, 213 Ill.Dec. 563, 659 N.E.2d 909 (1995)). In state court, Cruz seeks to have attorneys' fees excluded from any subrogation recovery by Plaintiffs.

In order to determine if remand of the state court action was appropriate, the district court applied the well-pleaded complaint rule which required it to look at the face of Cruz's state court complaint to determine if federal jurisdiction existed. Indeed, "federal jurisdiction depends upon the claim, not upon defenses, even [ ] preemption defenses." 324 F.3d 544, 549 (7th Cir.2003). In the Remand Order, the district court concluded neither complete preemption nor federal common law applied to Cruz's complaint alleging that the Service Benefit Plan violated the Illinois common fund doctrine. *Doyle*, 149 F.Supp.2d at 433-435. The district court noted that BCBS "will still be able to raise ordinary preemption as a defense to plaintiff's claims in state court." *Id*. at 434.

The Remand Order does not control this case. Plaintiffs filed a separate action now before this Court. Although Cruz contends that Plaintiffs' action for reimbursement is really one to litigate the application of the Illinois common fund doctrine, the face of the complaint seeks liability against Cruz under federal common law for failure to reimburse Plaintiffs under the Service Benefit Plan for amounts he recovered from a third-party tortfeasor. Plaintiff's action is not limited to the Illinois common fund doctrine. It is uncontested that Cruz has not paid any amount of reimbursement to Plaintiffs. As the Seventh Circuit has articulated, "the [Remand] [O]rder doesn't conclude the issue whether the district court has jurisdiction over [Plaintiffs'] new and materially identical

suit." *Health Cost Controls of Illinois, Inc. v. Washington*, 187 F.3d 703, 708-09 (7th Cir.1999). If Cruz wants to assert the Illinois common fund doctrine as a partial defense to this action, he is free to do so but that defense will not dictate whether federal jurisdiction exists. *See Adkins v. Illinois Cent. R. Co.*, 326 F.3d 828, 836 (7th Cir.2003) (jurisdiction determined by well-pleaded complaint rule). Accordingly, the Remand Order does not preclude this Court's jurisdiction.

IV. FEHBA

Although the complaint alleges that FEHBA provides a basis for jurisdiction in this case, Plaintiffs conceded at oral argument that it does not. FEHBA provides that "the district courts of the United States have original jurisdiction . . . of a civil action or claim against the United States founded on this chapter." 5 U.S.C. § 8912. Thus, FEHBA only creates a cause of action if the United States is a party. FEHBA does not provide for a private cause of action. *Id. See, e.g., Goepel v. National Postal Mail Handlers Union*, 36 F.3d 306, 312-13 (3rd Cir.1994) ("FEHBA does not create a cause of action vindicating a beneficiary's interest."); *Empire HealthChoice Assur. v. McVeigh ex rel. Estate of McVeigh*, No. 03 C 2728, 2003 WL 22171693 at *3 (S.D.N.Y. Sept.18, 2003) ("The FEHBA does not purport to create a private cause of action under federal law"); *Ramirez v. Humana, Inc.*, 119 F.Supp.2d 1307, 1312 (M.D.Fla.2000) (same). Given that the United States is not a party to this dispute, Plaintiffs cannot find jurisdiction in FEHBA.

V. Federal Common Law

Plaintiffs argue that federal common law provides a remedy in this case. It is clear that "[t]here is no federal general common law." *Moriarty v. Svec*, 164 F.3d 323, 328 (7th Cir.1998) citing *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). The Supreme Court has acknowledged, however, that a "few areas, involving uniquely federal interests, are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called 'federal common law.'" *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504, 108 S.Ct. 2510, 2514, 101 L.Ed.2d 442 (1988) (internal quotation and citation omitted). In order to determine if federal common law applies, a "uniquely federal interest" must be at issue, and a "significant conflict" must exist "between an identifiable federal policy or interest and the application of state law to the dispute or the application of state law would frustrate specific objectives of federal legislation." *Id.*, 487 U.S. at 507, 108 S.Ct. at 2515. *See also Northrop Corp. v. AIL Systems, Inc.*, 959 F.2d 1424, 1427 (7th Cir.1992). As the Seventh Circuit has articulated, federal common law applies to "essentially two categories: 'those in which a federal rule of decision is necessary to protect uniquely federal interests and those in which Congress has given the courts the power to develop substantive law.'" *Turner/Ozanne v. Hyman/Power*, 111 F.3d 1312, 1320 (7th Cir.1997) (quoting *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640, 101 S.Ct. 2061, 2066, 68 L.Ed.2d 500 (1981)). *See also Transit Exp., Inc. v. Ettinger*, 246 F.3d 1018, 1023 (7th

Cir.2001). Plaintiff is not advocating that Congress gave federal courts the power to develop substantive law in this area, thus the Court must determine if federal common law is necessary to protect a unique federal interest.

A. Unique federal interest

Plaintiffs contend that the FEHBA program is an area of uniquely federal concern because it involves the United States Treasury. Plaintiffs argue that the reimbursement money they seek from Defendant Cruz belongs, at least in part, to the United States Treasury because the United States subsidizes its employees' health benefits. Numerous courts have rejected the argument that such a possible impact on the federal treasury alone is sufficient to create a unique federal interest. *See Howard v. Group Hosp. Service*, 739 F.2d 1508, 1511 (10th Cir.1984) ("State court awards of monetary judgments in FEP benefits actions do not have a sufficiently direct effect on the federal treasury to necessitate federal jurisdiction."); *Lambert v. Mail Handlers Benefit Plan*, 886 F.Supp. 830, 837 (M.D.Ala.1995) ("Although it is true that the federal treasury pays a large percentage of the bills for the plan at issue, this alone does not suffice."); *Illinois Psychiatric Hosp. Co., Inc. v. Health Care Service Corp.*, No. 92 C 2880, 1992 WL 166823 at *2 (N.D.Ill. July 9, 1992) ("Any potential effect state court monetary judgments in FEHBA benefits actions may have on the federal treasury is not sufficiently direct to necessitate federal jurisdiction."). The Court agrees.

B. Uniformity

Plaintiffs further argue that federal common law is appropriate here to effectuate Congress's statutory design, namely, cost containment and the uniform application of FEHBA benefits. FEHBA, however, does not expressly provide for a cause of action in this case. If Congress wanted to advance these interests, it could have done so by specifically providing for a private cause of action where such interests are threatened. *See, e.g., Am. Paper Inst., Inc. v. U.S. Envtl. Prot. Agency*, 890 F.2d 869, 877 (7th Cir.1989) ("Congress could easily have provided jurisdiction for all types of restrictions on point sources by providing a general jurisdiction provision in the Act.").

Furthermore, Plaintiff's uniformity argument is undermined by the express language of the Statement of Benefits that HCSC distributes to participants of the Service Benefit Plan. That document expressly allows for payment of attorneys' fees or costs associated with a claim if the Plan gives prior approval of such payment. This is not a term dictated by FEHBA. Given that a carrier can make that determination on a case-by-case basis and that FEHBA does not provide any specific guidelines for the payment of attorneys' fees in connection with third-party recoveries, uniformity is certainly not advanced by the imposition of federal common law.

C. Preemption

Plaintiffs also assert that FEHBA's preemption provision mandates a federal common law remedy in this case. FEHBA's preemption provision states:

> The terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans.

5 U.S.C. § 8902(m)(1). The express language of this statute limits preemption to "coverage or benefits." It does not cover reimbursement based on a beneficiary's recovery from a third party tortfeasor. It similarly does not pertain to the Illinois common fund doctrine. Furthermore, as the Seventh Circuit stated in *Blackburn v. Sundstrand Corp.*, 115 F.3d 93, 495 (7th Cir.1997), "[m]ost applications [of the common fund doctrine] have nothing to do with health insurance in general."

Plaintiffs' reliance on the Seventh Circuit's recent decision in *Administrative Committee of the Wal-Mart Stores, Inc. Associates Health & Welfare Plan v. Varco*, 338 F.3d 680 (7th Cir.2003), is misplaced. *Varco* involved an ERISA plan that specifically provided that it "does not pay for nor is [it] responsible for the participant's attorney's fees. Attorney's fees are to be paid solely by the participant." *Id.* at 689. The Seventh Circuit held that the Illinois common

fund doctrine expressly conflicted with these terms of the ERISA plan and thus it was preempted by ERISA's conflict preemption provision. *Id.* ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . ." 29 U.S.C. § 1144(a). Congress's broad intent to preempt is clear from the face of ERISA's preemption provision. In contrast, FEHBA's preemption provision is much more narrow.

Plaintiffs argue that the reasoning in *Caudill v. Blue Cross and Blue Shield of North Carolina*, 999 F.2d 74 (4th Cir.1993), strengthens their preemption argument. In *Caudill*, the Fourth Circuit found that federal jurisdiction existed over a claim under FEHBA regarding the extent of benefits coverage for a breast cancer patient, and thus the defendants had properly removed it. The *Caudill* court held that federal jurisdiction existed under *Boyle* because a uniquely federal interest existed—"imposition of state law liability here would seriously damage not only the government's ability to enter into contracts with health insurers, but also would affect the price paid for such contracts." 999 F.2d at 78. The Court further noted that FEHBA's preemption provision buttressed the *Boyle* analysis because it supported Congress's intent for uniformity in this area. Plaintiffs argue that this reasoning supports federal jurisdiction in this case. This Court declines to extend the Fourth Circuit's reasoning to this case involving reimbursement. *See also Doyle*, 149 F.Supp.2d at 436 (declining to apply *Caudill* in the removal context).

D. Harris

Plaintiff also argues that the Seventh Circuit held in *Harris v.. Mutual of Omaha Cos.*, 992 F.2d 706, 711 (7th Cir.1993), that courts should apply federal common law to claims pertaining to FEHBA health plans. In *Harris,* the Seventh Circuit stated, in a footnote, "[w]e see no reason to disagree with our colleagues in the Eleventh Circuit that federal law applies" to the "interpretation of government health insurance contracts." *Harris,* 992 F.2d at 711 (citing *Tackitt v. Prudential Ins. Co. of Am.*, 758 F.2d 1572, 1575 (11th Cir.1985) (quotations omitted)). *Harris,* unlike this case, involved the issue of whether the plaintiff's government health insurance contract provided for the coverage of certain medical procedures recommended by one of her physicians. Similarly, the *Tackitt* court, upon which the Seventh Circuit relied, held that federal law applied in a case involving the interpretation of "benefit" under a health insurance contract. The application of federal common law to the interpretation of what *benefits* are covered under federal health insurance is consistent with FEHBA's preemption provision. The Court does not read these cases to mandate the application of federal common law to reimbursement disputes among private parties.

Furthermore, the parties do not dispute the interpretation of any contract terms. Instead, Plaintiffs claim they are entitled to reimbursement under the terms set forth in the Statement of Benefits. Defendant Cruz does not dispute the reimbursement provision, but rather contends that the Illinois common fund doctrine applies and precludes full

reimbursement. Thus, even under a broad reading of *Harris*, federal common law would not apply because the parties are not asking the Court to interpret the Statement of Benefits.

CONCLUSION

Defendant's motion to dismiss is granted.

Dated: November 14, 2003

ENTERED:

s/ Amy J. St. Eve
AMY J. ST. EVE
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED MARCH 8, 2005

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 8, 2005

Before

Hon. RICHARD A. POSNER, *Circuit Judge*

Hon. MICHAEL S. KANNE, *Circuit Judge*

Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

No. 03-4170

BLUE CROSS and BLUE SHIELD OF ILLINOIS, a Division of Health Care Service Corporation, a Mutual Legal Reserve Company; and BLUE CROSS BLUE SHIELD ASSOCIATION,

Plaintiffs-Appellants,

v.

JULIA CRUZ as Representative of JOSE S. CRUZ,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

No. 01 C 9821

Amy J. St. Eve, *Judge*.

Appendix C

ORDER

On consideration of the petition for rehearing and petition for rehearing *en banc*, no judge in active service has requested a vote on the petition for rehearing *en banc* * and all of the judges on the original panel have voted to deny rehearing. It is, therefore, ORDERED that rehearing and rehearing *en banc* are DENIED.

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* Judge Ripple took no part in the consideration or decision of this case.

APPENDIX D — RELEVANT STATUTE

5 U.S.C.A. § 8902

United States Code Annotated
Title 5. Government Organization and Employees
Part III. Employees
Subpart G. Insurance and Annuities
Chapter 89. Health Insurance

§ 8902. Contracting authority

* * *

(m)(1) The terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans.

* * * *

(2)

No. 04-1657

IN THE

Supreme Court of the United States

JULIA CRUZ, as Representative of Jose S. Cruz,

Petitioner,

v.

BLUE CROSS BLUE SHIELD OF ILLINOIS, a Division of Health Care Service Corporation, a Mutual Legal Reserve Company; and BLUE CROSS BLUE SHIELD ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTION PRESENTED

Whether federal question jurisdiction exists over a suit by a federal government contractor to enforce, on behalf of the United States, a provision in a health benefits plan for federal employees that is part of a government contract established pursuant to the Federal Employees Health Benefits Act.

STATEMENT PURSUANT TO RULE 29.6

Respondents are Blue Cross and Blue Shield of Illinois, a division of Health Care Service Corporation, a Mutual Legal Reserve Company; and Blue Cross Blue Shield Association. Neither respondent has a parent company, and no publicly held company owns any of either respondent's stock.

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5 U.S.C. § 8909(a) 4
5 U.S.C. § 8909(b) 5
5 U.S.C. § 8912 ..... 8, 11
5 U.S.C. § 8913 2

Employee Retirement Income Security Act,
29 U.S.C. § 1144 9

Federal Employees Health Care Protection Act
of 1998, Pub. L. No. 105-266,
112 Stat. 2363 (1998) 6

REGULATIONS

5 C.F.R. § 890.503(c) 5

48 C.F.R. § 1615.902 5

48 C.F.R. § 1632.170(b) 4

60 Fed. Reg. 16,037 (1995) 12

61 Fed. Reg. 15,177 (1996) 12

LEGISLATIVE HISTORY

H.R. Rep. No. 86-957 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2913 2

H.R. Rep. No. 105-374 (1997) 6

Respondents Blue Cross Blue Shield of Illinois, a Division of Health Care Service Corporation, a Mutual Legal Reserve Company ("HCSC") and Blue Cross Blue Shield Association ("BCBSA") respectfully respond to the petition for certiorari filed in this case.

STATEMENT

In this action, a unanimous panel of the court of appeals for the Seventh Circuit held that there is federal subject matter jurisdiction over a suit to enforce the terms of a health benefits plan governed by the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. §§ 8901-8914. The decision below conflicts with the contrary decision of a divided panel of the court of appeals for the Second Circuit in *Empire HealthChoice Assurance, Inc. v. McVeigh*, 396 F.3d 136 (2d Cir. 2005), *petition for cert. filed*, No. ___ (Aug. 8, 2005). This case presents the same question as *Empire*, and Respondents here are represented by the same counsel as are the petitioners in *Empire*. For the reasons set forth in the petition in *Empire* and further set forth below, Respondents respectfully suggest that this Court grant the petition in *Empire* and hold the petition in this case pending the disposition of *Empire*. *Empire* presents a better vehicle for resolving the question presented because it is procedurally less complex; moreover, the expansive reasoning in *Empire* makes that decision potentially more damaging to the FEHBA program.

The statutory background set forth in the sections below is materially identical to that set forth in the petition in *Empire*, and the facts and procedural history summarized here are offered in addition or correction to those set forth in the petition in this case.

A. The Statutory, Regulatory, and Contractual Scheme

1. *The Service Benefit Plan*. Congress enacted the Federal Employees Health Benefits Act ("FEHBA"), 5 U.S.C. §§ 8901-8914, in 1959 to provide "a measure of protection for civilian Government employees against the high, unbudgetable, and, therefore, financially burdensome costs of medical services through a comprehensive government-wide program of insurance for federal employees . . ., the costs of which [would] be shared by the Government, as employer, and its employees." H.R. Rep. No. 86-957, at 1 (1959), *reprinted in* 1959 U.S.C.C.A.N. 2913, 2914. Overall, Congress sought to "assure maximum health benefits for employees at the lowest possible costs to themselves and to the Government." *Id.* at 4, *reprinted in* 1959 U.S.C.C.A.N. at 2916.

To achieve these goals, FEHBA delegates expansive authority to OPM. It "'gives OPM the authority to administer the program by contracting with qualified private carriers to offer a variety of health care plans, 5 U.S.C. § 8902, by distributing information on the available plans to eligible employees, [5 U.S.C.] § 8907, by promulgating necessary regulations, [5 U.S.C.] § 8913, and by interpreting the plans to determine the carrier's liability in an individual case, [5 U.S.C.] § 8902(j).'" *Muratore v. United States OPM*, 222 F.3d 918, 920 (11th Cir. 2000) (quoting *Kobleur v. Group Hosp. & Med. Servs.*, 954 F.2d 705, 709 (11th Cir. 1992)) (brackets in original).

One plan for which OPM has contracted is the Service Benefit Plan (or the "Plan"), a nationwide fee-for-service plan expressly described in FEHBA. 5 U.S.C. § 8903(1). OPM contracts with BCBSA to provide the Plan, a contract with a lineage dating back to 1960. In signing the contract, BCBSA acts on behalf of the local Blue Cross and Blue Shield companies who administer the Plan in their respective localities. OPM and BCBSA annually renegotiate the government contract for the Service Benefit Plan, including the premium rates and the scope of benefits to be provided under the Plan.

2. *Plan Benefits Terms and Limitations*. Each FEHBA contract, including the contract governing the Service Benefit Plan, "shall contain a detailed statement of benefits offered and shall include such maximums, limitations, exclusions, and other definitions of benefits as [OPM] considers necessary or desirable." 5 U.S.C. § 8902(d). The Statement of Benefits for the Service Benefit Plan is attached to and incorporated into the OPM-BCBSA contract and is the official description of benefits and other Plan terms. Court of Appeals Joint App. ("J.A.") 17, 354, 357. Consistent with OPM's obligation to provide information to enrollees about coverage, FEHBA mandates that a copy of the Statement of Benefits "shall be issued" to "[e]ach individual enrollee." 5 U.S.C. § 8907(b).

Of particular relevance to this case are the terms in the Service Benefit Plan's Statement of Benefits concerning reimbursement. The Statement of Benefits provides (J.A. 27):

> If you or your covered dependent suffer an injury or illness through the act or omission of another, you and your dependent agree: 1) to reimburse the Plan for benefits paid by the Plan in an amount not to exceed the amount of the recovery; and 2) that the Plan be subrogated to your (or your dependent's) rights to the extent of the benefits paid, including the right to bring suit. All recoveries from a third party (whether by lawsuit, settlement, or otherwise) must be used to reimburse the Plan for benefits paid. . . .
>
> Any reduction of the Plan's claim for payment of attorney's fees or costs associated with the claim is subject to prior approval by the Plan.[1]

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[1] Petitioner erroneously states that the Statement of Benefits in which the reimbursement provision appears is somehow not part of the OPM-BCBSA government contract, but is a "separate document" that is "prepared and issued by a private carrier." *See* Pet. 14 & *i* (question presented). Again, the Statement of Benefits is incorpo-

The OPM-BCBSA contract also further addresses reimbursement by requiring the carrier to make "reasonable effort to seek recovery of amounts to which it is entitled to recover in cases which are brought to its attention." J.A. 365. Furthermore, the contract mandates that all Blue Cross and Blue Shield entities "shall subrogate under a single, nation-wide policy to ensure equitable and consistent treatment for all Members under the contract." *Id.* at 365, 444.

3. *Plan Funding*. The Plan's funding is delineated both in FEHBA and OPM's regulations. The United States itself, in an amicus brief in support of the petitioners in *Empire* at the rehearing stage in the Second Circuit (which was introduced into the record in this case), has succinctly detailed the Plan's fiscal operations:

> By statute, the government and the enrollee share responsibility for premiums payable to the plan. 5 U.S.C. § 8906. The employing agency (or OPM for annuitants) pays 72% to 75% of the premium as part of its payroll costs funded by general appropriations. *Id.* §§ 8906(b)(1), (b)(2), (f). Premiums are deposited into a special Treasury fund called the Federal Employees Health Benefits Fund. *Id.* § 8909(a).
>
> Under the type of plan at issue in this litigation, the carrier draws against the Fund on a "checks-presented" basis to pay for covered health care services. *Id.* § 8909(a); 48 C.F.R. § 1632.170(b). Any balance in the Fund is not the property of [the] carrier. Rather, the carrier's profit, if any, comes from a negotiated service charge. *See National Ass'n of Postal Supervisors v. United States*, 21 Cl.

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rated into the contract. Furthermore, the OPM-BCBSA contract specifically states: "[t]he Carrier's subrogation rights, procedures and policies, including recovery rights, shall be in accordance with the provisions of the Certified brochure text," which is the Statement of Benefits. J.A. 357.

> Ct. 310, 315 (1990) ("The service charge is the only profit element of FEHBA. * * * [The] carrier may not make a profit on the premium charges themselves."), *aff'd mem.*, 944 F.2d 859 (Fed. Cir. 1991); *see also* 48 C.F.R. § 1615.902. Any surplus in a plan's contingency reserves may be used, at OPM's discretion, to defray future rates, reduce future government and employee contributions, increase plan benefits, or refund the monies to the government and plan enrollees. 5 U.S.C. § 8909(b); 5 C.F.R. § 890.503(c)(2).

Amicus Br. of U.S. in *Empire* at 5 (appearing in *Cruz* record in the 7th Cir. at Exh. A to Pls.-Appellants' Ans. to Def.-Appellee's Petition for Reh'g with Suggestion for Reh'g En Banc) ["U.S. Amicus"].[2]

Under this fiscal regime, money collected under the Plan's reimbursement terms does not belong to the carrier, but instead inures to the government's benefit. Pursuant to the OPM-BCBSA contract, the carrier must, and does, credit all reimbursement amounts to the Treasury fund, the source for the benefits in the first place. J.A. 672-73. As a result, the United States has said: Because "the carrier has no property interest in any balance remaining in the Treasury fund after benefits are paid out and reimbursements received," the "requirement that enrollees reimburse the carrier for monies obtained in tort suits is . . . a critical feature of the federal health benefits program that inures to the benefit of the government." U.S. Amicus at 9 (*Empire* Pet. App. 72a).

4. *FEHBA's Preemption Provision*. FEHBA contains an express preemption provision, codified at 5 U.S.C.

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[2] The United States's amicus brief is included in the Petitioner's Appendix accompanying the petition for certiorari in the *Empire* case (65a-79a). The passage quoted here is at *Empire* Pet. App. 69a.

§ 8902(m)(1). As amended in 1998, the preemption provision currently provides:

> The terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans.

5 U.S.C. § 8902(m)(1) (2000) (codifying Federal Employees Health Care Protection Act of 1998, Pub. L. No. 105-266, § 3(c), 112 Stat. 2363, 2366 (1998)).

In enacting the current preemption language, which "broaden[ed]" an earlier version of the preemption clause, Congress sought to ensure "the ability of national plans to offer uniform benefits and rates to enrollees regardless of where they may live." H.R. Rep. No. 105-374, at 9 (1997). Congress added that the amendment "will strengthen the case for trying FEHB program claims disputes in Federal courts rather than State courts" and "will also prevent carriers' cost-cutting initiatives from being frustrated by State laws." *Id.*

B. The Proceedings Below

During the times relevant to this case, Jose S. Cruz, a federal employee, was enrolled in the Service Benefit Plan. After Cruz was injured in a car accident, HCSC – the Blue Cross and Blue Shield entity administering the Plan in Illinois – provided benefits in connection with his injuries. Subsequently, Cruz reached a settlement with the tortfeasor allegedly responsible for his injuries and, under the settlement, received money substantially in excess of his medical expenses. HCSC then requested that Cruz reimburse the health benefits the Plan had paid, pursuant to the reimbursement provision contained in the Statement of Benefits. Cruz refused to do so, which triggered litigation in both the state and federal courts.

Cruz first brought a putative class action in the Circuit Court of Cook County, Illinois, asserting that HCSC acts improperly in seeking to collect reimbursement amounts that are not automatically reduced to account for the enrollee's attorney fees incurred in obtaining recoveries from tortfeasors. Cruz argued that the "common fund" doctrine, established under Illinois common law, requires such an offset. HCSC removed the state court case to the United States District Court for the Northern District of Illinois, but the district court remanded the case. That suit today remains active in the state court.

In the state court proceedings, the United States filed a "Statement of Interest" and asserted both that FEHBA preempts Cruz's state law complaint and that the lawsuit is barred by the United States's sovereign immunity. In its Statement of Interest, the United States said:

> [P]laintiff's claims are preempted under FEHBA by the terms of the Government contract establishing the Service Benefit Plan. The statute and contract alike were crafted to avoid impairments of the Federal Government interests like those that would be worked by the relief plaintiff seeks. Even absent preemption, the substantive issues in this case call for application not of State law, but of Federal common law, which does not allow plaintiff to obtain the relief he seeks at the expense of the Government and contrary to its interests.

Statement of Interest of the United States at 2, in *Doyle v. Blue Cross Blue Shield of Ill.*, No. 00 CH 14182 (Cir. Ct. Cook County, Ill.) (appearing in *Cruz* record in the 7th Cir. at Exhibit D to Appellants' Mot. to Enjoin Related State Ct. Proceedings or, Alternatively, for Clarification of the Ct.'s Jan. 24, 2005 Decision, filed Mar. 14, 2005).

Notwithstanding the United States's position, the state court has refused to dismiss the action. Last month, the state court certified a class of FEHBA enrollees that will seek refunds of past reimbursement amounts now contained in the federal

Treasury. It did so even though the United States is not and cannot be a party in the state court. *See* 5 U.S.C. § 8912 (providing that the United States may be sued under FEHBA only in federal court).

In the meantime, HCSC and BCBSA brought this action in the district court to enforce the Plan's reimbursement terms. They averred that the court had federal question jurisdiction because the suit was "founded on [FEHBA] . . ., federal contracts and regulations established pursuant to FEHBA, and federal common law." J.A. 2. Cruz moved to dismiss, asserting that the district court lacked federal question jurisdiction.

The district court granted the motion to dismiss. Pet. App. 16a-31a. It concluded that FEHBA reimbursement actions are not governed by federal common law because, in the district court's view, they do not involve "'uniquely federal interests'" and there was no "'significant conflict'" between the application of state law and any federal policy or objective. *Id.* at 25a-27a (quoting *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988)). The district court also held that FEHBA's preemption provision, 5 U.S.C. § 8902(m)(1), did not support "a federal common law remedy." Pet. App. 26a-27a.[3]

A unanimous panel of the court of appeals (Judge Kanne, joined by Judges Posner and Williams) reversed. Pet. App. 1a-15a. Though the court recognized that there is no explicit cause of action in FEHBA covering the controversy, it ruled that federal jurisdiction followed from FEHBA's preemption clause. The court noted that the reimbursement terms are "part of the FEHBA-authorized Service Benefit Plan contract" and

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[3] Jose S. Cruz died during the pendency of the district court litigation. Upon joint motion of the parties, the court of appeals substituted his wife, Petitioner Julia Cruz, as representative of Jose S. Cruz. The state court likewise substituted Julia Cruz, as representative of Jose S. Cruz, in the state court.

that FEHBA "dictates that the contract terms trump state law when they relate to the nature, provision, or extent of coverage or benefits including payments with respect to benefits." *Id.* at 8a-9a.

The court then proceeded to "examine the purpose of the preemption provision." *Id.* at 9a. The court noted that "Congress broadened the preemption provision in 1998, intending to expand federal jurisdiction over FEHBA claims even when state law does not conflict with FEHBA contract provisions." *Id.*[4] The purpose of the broadened preemption clause, the court explained, was to advance the goals of "[u]niform administration and cost-savings," which were also goals of the original FEHBA enactment. *Id.* at 9a-10a. These goals would be undermined, the court concluded, if FEHBA contract provisions do not preempt state law regarding subrogation. The court also noted that state subrogation law is preempted by the Employee Retirement Income Security Act, 29 U.S.C. § 1144, and, given that rule for private employer plans, "it would be strange to leave regulation to the individual states when the employer is the United States itself." Pet. App. 11a.

On these bases, the court concluded that "state law regarding subrogation is preempted by the reimbursement provision in the Service Benefit Plan." *Id.* at 10a. With state law preempted, the court said it needed simply to "'fill in [FEHBA's] interstices with federal common law.'" Pet. App. 12a (quoting *UIU Severance Pay Trust Fund v. Local Union No. 18-U, United Steelworkers*, 998 F.2d 509, 512 (7th Cir. 1993)). The

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[4] As originally enacted, the preemption clause provided that FEHBA contract provisions relating to benefits and coverage "preempt any state or local law . . . which relates to health insurance or plans *to the extent that such law or regulation is inconsistent with such contractual provisions*." 5 U.S.C. § 8902(m)(1) (1994) (emphasis added). Congress eliminated the italicized inconsistency requirement when it amended section 8902(m)(1) in 1998.

court added: "With no explicit statutory cause of action on which to rely and with state law preempted, Congress's clear intent to have uniform subrogation rules per the terms of the FEHBA-created contract require 'a judicially-crafted cause of action.'" *Id.* (quoting *UIU Severance*, 998 F.2d at 512-13).

As a result of its preemption ruling, the court found it unnecessary to decide the case under a *Boyle* analysis. But it emphasized that, consistent with *Boyle*, there was no doubt "the impact of reimbursement on the federal Treasury creates a significantly federal interest" and the application of state law would conflict with the federal policy of uniformity. *Id.* at 11a.[5]

DISCUSSION

The court of appeals correctly ruled that federal question jurisdiction exists in this case for reasons well stated in its opinion. Petitioner's criticisms of the court of appeals' decision are ill-founded. In particular, we note three significant statements in the petition that require correction.

First, Petitioner uses an out-of-context quotation from the Statement of Interest filed by the United States in the state court proceedings to suggest that the United States disagrees with Respondents' position on the question presented. *See* Pet. 6. As is apparent from an examination of the entire Statement of Interest, however, the United States strongly supported HCSC's position in the state court. The Statement of Interest

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[5] The court of appeals rejected Cruz's request that it abstain from exercising jurisdiction in favor of the state court suit. Pet. App. 12a-14a. In fact, the court of appeals held that the state court suit was, essentially, an illegitimate one, since it sought "to declare illegal the Service Benefit Plan terms regarding subrogation that OPM promulgated," when OPM was "unable to participate as a party in a state court suit under 5 U.S.C. § 8912." Pet. App. 14a. Cruz has not sought review of the abstention holding.

totaled twenty pages, with the first nineteen pages asserting that FEHBA preempts the Illinois common fund doctrine, that federal common law controls the dispute between the parties, and that the state court case is barred by sovereign immunity. The sentences that Petitioner quotes are found in the last two paragraphs of the United States's brief, which addressed solely whether Respondents additionally could invoke official immunity as a defense to Petitioner's state court action. It also should be noted that the United States's amicus brief at the rehearing stage in *Empire* forcefully asserts that the federal courts have jurisdiction to hear a FEHBA carrier's suit for reimbursement.

Second, Petitioner expends substantial energy arguing that FEHBA's jurisdictional provision allowing for suits in federal court against the United States, 5 U.S.C. § 8912, bars federal jurisdiction over other FEHBA actions. Pet. 8-10. A week after the filing of the petition in this case, this Court reiterated, in *Grable v. Darue Engineering & Manufacturing*, 125 S. Ct. 2363, 2370 (2005), that lack of a federal cause of action covering a controversy is "not dispositive" of the issue whether federal question jurisdiction exists. *Grable* negates a primary criticism Petitioner has leveled against the court of appeals' decision.

Third, Petitioner suggests that, among the circuit precedents with which the Seventh Circuit's decision conflicts, are *Botsford v. Blue Cross & Blue Shield of Montana*, 314 F.3d 390 (9th Cir. 2002); *Goepel v. Nat'l Postal Mail Handlers Union*, 36 F.3d 306 (3d Cir. 1994); and *Howard v. Group Hosp. Servs.*, 739 F.2d 1508, 1511 (10th Cir. 1984). There are no conflicts with these decisions. *Botsford* held that the federal courts *do* have jurisdiction over enrollee suits for benefits against carriers (albeit to dismiss them because OPM is the only proper defendant in such controversies), thereby undermining Petitioner's assertion that federal jurisdiction is limited to FEHBA claims against the United States. *See Botsford*, 314

F.3d at 399. *Goepel* involved removal jurisdiction over a state law claim for benefits, with the Third Circuit indicating that the result might be different if the complaint originally were filed in federal court and invoked federal law. *See Goepel*, 36 F.3d at 315-16 & n.3. Finally, *Howard* rejected federal jurisdiction, but rested heavily on OPM regulations that since have been amended expressly to facilitate federal jurisdiction. *Compare Howard*, 739 F.2d at 1511 *with* 60 Fed. Reg. 16,037 (1995) (interim regulations); 61 Fed. Reg. 15,177 (1996) (final regulations).

Notwithstanding these various points of disagreement with Petitioner, Respondents agree with Petitioner that the court of appeals' decision directly conflicts with the Second Circuit's decision in *Empire HealthChoice Assurance, Inc. v. McVeigh*, 396 F.3d 136 (2d Cir. 2005), *petition for cert. filed*, No. ___ (Aug. 8, 2005). Respondents also agree with Petitioner that the conflict concerns an issue of national importance and that it is important for this Court to resolve the conflict. Accordingly, Respondents do not oppose the petition for certiorari.

As explained in more detail in the pending certiorari petition in *Empire*, however, we submit that *Empire* presents a better vehicle for resolution of the conflict than does this case. The procedural context of this case is more complicated than *Empire*, with proceedings continuing in a parallel state court action. On the merits, the breadth of the Second Circuit's decision in *Empire* casts the FEHBA program into considerable disarray, and a decision by this Court in that case may be more effective in eliminating uncertainty and forestalling future disputes than would a decision here. We submit, therefore, that it would be appropriate for the Court to grant certiorari in *Empire* and to hold this case pending the disposition of that case.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the disposition of *Empire HealthChoice Assurance, Inc. v. McVeigh*, No. ___ (filed Aug. 8, 2005). Alternatively, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 04-1657

IN THE

Supreme Court of the United States

JULIA CRUZ, AS REPRESENTATIVE OF JOSE S. CRUZ,

Petitioner,

v.

BLUE CROSS BLUE SHIELD OF ILLINOIS, A DIVISION OF HEALTH CARE SERVICE CORPORATION, A MUTUAL LEGAL RESERVE COMPANY; AND BLUE CROSS BLUE SHIELD ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONERS RESPONDING TO AMICUS CURIAE BRIEF OF UNITED STATES

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SUPPLEMENTAL BRIEF OF PETITIONER CRUZ

NOW COMES Julia Cruz, as Special Administrator to Jose Cruz, Petitioner in Docket No. 04-1657, and presents her Supplemental Brief in response to the United States who, at the invitation of this Court, filed an amicus brief on December 13, 2005.

PREFACE

Notably, the United States supports Cruz's petition, contending that a clear, present conflict exists between the Seventh Circuit's ruling in this case and the Second Circuit's decision in *Empire Health Choice Assurance, Inc. v. McVeigh*, 396 F.3d 136 (2d Cir. 2005), *reconsideration denied*, 402 F.3d 107, and that this conflict[1] concerns an issue of national importance which can be expected to arise in the future. *See* Brief for the United States as Amicus Curiae at 2, 8-9. ("United States Br. at __").

Where the United States parts ways with Petitioner Cruz is on the merits of the legal issues and the "vehicle" in which this Court should consider this matter. On the merits, the United States argues that federal question jurisdiction exists over reimbursement claims brought by private insurers against insureds who are covered by health plans governed by the Federal Employees Health Benefits Act of 1959, 5 U.S.C. § 8901, *et seq.* ("FEHBA"). Petitioner, as explained in her initial brief, contends that in this context federal jurisdiction does not

1. The United States agrees with Petitioner that the Circuit conflict extends beyond the Seventh and Second Circuits, to include the Eighth Circuit's decision in *MedCenters Health Care v. Ochs*, 26 F.3d 865, 867 (8th Cir. 1994). United States Br. at 12.

Although the United States and Petitioner disagree over the extent of the conflict that *Cruz*, *Empire* and *Ochs* have with other Circuit decisions, *see* United States Br. at 13-14, this disagreement highlights an important issue in this case, i.e., that a claim for reimbursement is distinct from a claim for benefits. It is only the latter, Petitioner contends, that is subject to federal question jurisdiction.

exist over an insurer's reimbursement claim. Since the parties' merits disagreements are largely addressed in their briefs before this Court, they will not be further raised here.

With respect to the appropriate vehicle for this Court to consider this matter, after acknowledging that the Court should grant this petition, the United States provides little support for its position that the *Empire* case provides the better vehicle. United States Br. at 19-20. The United States' position appears to be strategic, motivated more by its desired outcome rather than a concern for how the cases' procedural postures may affect this Court's review.

DISCUSSION

A. *Cruz*, Not *Empire*, Provides The Better Vehicle For Review

As the first filed petition, the *Cruz* case, not *Empire*, should be the chosen vehicle if only one case is accepted. Petitioner Cruz has vigorously litigated this action in both federal and state courts for several years, and, consequently, would provide this Court with more insightful advocacy on the legal and factual issues. Indeed, Cruz's petition sets forth more relevant legal and factual details regarding the issues in this case than the petition filed in *Empire*, such as raising all points of disagreement amongst the Circuits, setting forth FEHBA's legislative history in order to highlight the limited scope of the statute's preemption provision, and clarifying Blue Cross's role *vis-a-vis* the Government when asserting reimbursement claims (which, as conceded by the Government, involves them "function[ing] as independent economic entities that offer and run their own health insurance plans, performing a role that is not governmental in nature but, instead, is akin to their activities as insurers in the private-sector marketplace."). *See* Cruz's Petition for Writ of Certiorari at 6.

The United States' concern that Petitioner Cruz's on-going state court action may raise issues that are not independently worthy of review is overstated and wrong. In the event the petition is granted, this Court will inform the parties on the issue(s) to be heard and Petitioner Cruz will conform to such instruction. Moreover, the issue of whether federal question jurisdiction exists necessarily involves whether state courts alone should hear the parties' dispute. That Petitioner Cruz has a long, developed history of litigating a parallel matter against Blue Cross in state court will assist, not hinder, this Court's decision. Including this case will ensure that undersigned counsel will be well prepared to respond to any question of how a ruling may affect state court actions.[2]

B. Alternatively, Consolidating The Cases Would Also Be Acceptable

While it would certainly be acceptable to Petitioner Cruz for this case to be considered alone and the *Empire* case stayed, Petitioner is certainly open to having this Court consolidate the *Empire* and *Cruz* cases, as it regularly does in these situations. *See, e.g., Aetna Health, Inc. v. Davila et al.*, 542 U.S. 200 (2004) (consolidated two cases involving similar claims against an HMO; one brought by a participant and the other by a beneficiary); *Exxon Mobile Corp. v. Allapattah Services, Inc.*, 125 S. Ct. 2611 (2005) (consolidated two cases involving gasoline dealers' class actions against gasoline supplier); *Clark v. Martinez*, 125 S. Ct. 716 (2005) (consolidated two similar habeas claims); *Granholm v. Heald*, 125 S. Ct. 1885

2. The United States shows that its suggestion to select only the *Empire* case is grounded in a tactical belief that such a posture will enhance its chances of prevailing on the merits. For instance, in its brief, which purports to address both petitions, the United States takes issue with only arguments raised by Petitioner Cruz, even though the Respondent in *Empire* takes the same position. *See* United States Br. at 4 n.1 (addressing a disagreement with only Cruz); *cf.* Brief of Respondent in *Empire* at 4 (raising same argument supported by Cruz).

(2005) (consolidated two cases; one involving New York's alcohol distribution laws and the other Michigan's alcohol distribution laws because they presented the same question); and *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989) (consolidated two cases "to consider the common and separate issues presented by both cases."). As the present cases involve substantially identical[3] questions for the Court and given that Blue Cross is represented by the same counsel in both cases, consolidating and hearing both cases is appropriate.

CONCLUSION

The petition for writ of certiorari in this case should be granted.

Respectfully submitted,

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3. Respondent's argument in *Empire*, that the Second Circuit's decision is distinguishable from the Seventh Circuit's on the existence of a state law conflict (*see*, Respondent's Br. at 7) further supports not excluding Cruz from plenary review. Cruz's counsels' experience with dealing with an apparent, direct state law conflict will facilitate this Court's consideration of that matter.

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Nos. 04-1657 and 05-200

In the Supreme Court of the United States

JULIA CRUZ, AS REPRESENTATIVE OF JOSE S. CRUZ, PETITIONER

v.

BLUE CROSS AND BLUE SHIELD OF ILLINOIS, ET AL.

EMPIRE HEALTHCHOICE ASSURANCE, INC. DBA EMPIRE BLUE CROSS BLUE SHIELD, PETITIONER

v.

DENISE F. MCVEIGH, AS ADMINISTRATRIX OF THE ESTATE OF JOSEPH E. MCVEIGH

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SEVENTH AND SECOND CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether federal question jurisdiction exists over a suit by a federal government contractor to enforce a provision in a health benefits plan for federal employees that is part of a government contract under the Federal Employees Health Benefits Act of 1959, 5 U.S.C. 8901 *et seq.*

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In the Supreme Court of the United States

No. 04-1657

JULIA CRUZ, AS REPRESENTATIVE
OF JOSE S. CRUZ, PETITIONER

v.

BLUE CROSS AND BLUE SHIELD OF ILLINOIS, ET AL.

No. 05-200

EMPIRE HEALTHCHOICE ASSURANCE, INC. DBA EMPIRE
BLUE CROSS BLUE SHIELD, PETITIONER

v.

DENISE F. MCVEIGH, AS ADMINISTRATRIX
OF THE ESTATE OF JOSEPH E. MCVEIGH

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SEVENTH AND SECOND CIRCUITS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the orders of this Court inviting the Solicitor General to express the views of the United States.

STATEMENT

These cases each present the question whether the federal courts have federal-question jurisdiction over cases brought to enforce the terms of contracts created under the Federal Employees Health Benefits Act of 1959 (FEHBA), 5 U.S.C. 8901 *et seq.* The courts of ap-

peals reached different conclusions on the question, and the issue merits the Court's review.

1 a. Congress enacted the Federal Employees Health Benefits Act to establish a comprehensive program that would "assure maximum health benefits for employees at the lowest possible cost to themselves and to the Government." H.R. Rep. No. 957, 86th Cong. 1st Sess. 4 (1959). Today, approximately eight million federal employees, retirees, and their dependents receive health insurance through plans under FEHBA, at a total cost of about $31 billion per year in premiums, $22 billion of which is paid by the federal government. *OPM Announces Smallest Average FEHB Premium Increase in Nine Years* (Sept. 15, 2005) <http://www. opm.gov/news/opm-announces-smallest-average-FEHB-premium-increase-in-nine-years, 961.aspx>.

FEHBA delegates broad authority to the Office of Personnel Management (OPM) to administer the Federal Employees Health Benefits Program, see 5 U.S.C. 8901-8913, and to promulgate regulations necessary to carry out the statute's objectives, see 5 U.S.C. 8913. In particular, the statute gives OPM authority to contract with carriers to offer health benefits plans to federal employees, annuitants, and dependents. 5 U.S.C. 8902, 8903. Such plans must meet criteria established by OPM, and each contract must contain "a detailed statement of benefits offered and shall include such maximums, limitations, exclusions, and other definitions of benefits as the Office considers necessary or desirable." 5 U.S.C. 8902(d). Enrollees and beneficiaries are bound by the terms of the contract. See *Christiansen* v. *National Sav. & Trust Co.*, 683 F.2d 520, 530 (D.C. Cir. 1982).

By statute, the government and the enrollee share responsibility for premiums payable to the plan. 5 U.S.C. 8906 (2000 & Supp. II 2002). The employing agency (or OPM for annuitants) pays 72% to 75% of the premium as part of its payroll costs funded by general appropriations. 5 U.S.C. 8906(b)(1), (b)(2) and (f). Premiums are deposited into a special Treasury fund called the Employees Health Benefits Fund. 5 U.S.C. 8909(a).

Under the type of fee-for-service plan at issue in these cases, the carrier draws against the Fund on a "checks-presented" basis to pay for covered health care services. 5 U.S.C. 8909(a); 48 C.F.R. 1632.170(b). Any balance in the Fund is not the property of the carriers. Rather, the carrier's profit, if any, comes from a negotiated service charge. See *National Ass'n of Postal Supervisors* v. *United States*, 21 Cl. Ct. 310, 315 (1990) ("The service charge is the only profit element of FEHBA. * * * [The] carrier may not make a profit on the premium charges themselves."), aff'd, 944 F.2d 859 (Fed. Cir. 1991); see also 48 C.F.R. 1615.902. Any surplus attributable to a plan may be used, at OPM's discretion, to lower future rates, reduce future government and employee contributions, increase plan benefits, or make a refund to the government and plan enrollees. 5 U.S.C. 8909(b); 5 C.F.R. 890.503(c)(2).

The government ultimately decides whether a claim for medical services should be paid under the program. 5 U.S.C. 8902(j). If a carrier denies payment of a claim, the enrollee may seek OPM review. 5 C.F.R. 890.105(a)(1). OPM's determinations regarding the claim are subject to judicial review in federal court under the Administrative Procedure Act, 5 U.S.C. 701, 706. See, *e.g.*, *Muratore* v. *OPM*, 222 F.3d 918, 920 (11th Cir. 2000).

FEHBA provides that "[t]he terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans." 5 U.S.C. 8902(m). That provision was first enacted "to establish uniformity in Federal employee health benefits and coverage." H.R. Rep. No. 282, 95th Cong., 1st Sess. 1 (1977). It was broadened in 1998 "to strengthen the ability of national plans to offer uniform benefits and rates to enrollees regardless of where they may live" and to "strengthen the case for trying FEHB program claims disputes in Federal courts rather than state courts." H.R. Rep. No. 374, 105th Cong. 1st Sess. 9 (1997).

b. The largest plan in the FEHBA program is the Blue Cross Blue Shield Service Benefit Plan. Pursuant to 5 U.S.C. 8902(a), OPM has entered into annual contracts with the Blue Cross Blue Shield Association, acting on behalf of the Blue Cross Blue Shield affiliates in these two cases and a number of others across the nation. The contracts include a Statement of Benefits.[1] The Statement of Benefits in turn has a reimbursement

[1] Petitioners in *Cruz* mistakenly assert (Pet. 14) that the Statement of Benefits is not a part of the contract between OPM and Blue Cross. The contract between OPM and Blue Cross provides that "[t]he Carrier shall provide the benefits as described in the Certified Brochure Text found in Appendix A," and that "[t]he Carrier's subrogation rights, procedures and policies, including recovery rights, shall be in accordance with the Certified Brochure Text." 04-1657 C.A. App. 354, 357. The Certified Brochure Text is identical, other than in formatting, to the Statement of Benefits. Indeed, it recites that it "is based on text incorporated into the contract between OPM and [Blue Cross]." 04-1657 C.A. App. 17.

provision requiring enrollees and beneficiaries who receive compensation from a third party for an injury or illness to reimburse the plan for benefits paid.[2] If an enrollee does not voluntarily reimburse the plan, the contracts require Blue Cross to make a "reasonable effort to seek recovery of amounts * * * which it is entitled to recover in cases which are brought to its attention," 05-200 Pet. 5; see 04-1657 Resp. Br. 4 (petition stage), and to "subrogate under a single, nation-wide policy to ensure equitable and consistent treatment for all Members under the contract," 05-200 Pet. 5; see 04-1657 Resp. Br. 4 (petition stage).

2. *No. 05-200.* a. Joseph E. McVeigh, an enrollee in the FEHBA plan administered by Empire Healthchoice Assurance, Inc., suffered injuries in an automobile accident in 1997 and received approximately $157,000 in FEHBA benefits until his death in 2001. In 2003, McVeigh's estate recovered $3,175,000 in settlement of its tort suit arising from the accident. When it learned of the upcoming settlement, Empire, petitioner in No.

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[2] The provision in No. 05-200 states in relevant part:

> If another person or entity . . . causes you to suffer an injury or illness, and if we pay benefits for that injury or illness, you must agree to the following:
>
> All recoveries you obtain (whether by lawsuit, settlement, or otherwise), no matter how described or designated, must be used to reimburse us in full for benefits we paid. Our share of any recovery extends only to the amount of benefits we have paid or will pay to you or, if applicable, to your heirs, administrators, successors, or assignees.

05-200 Pet. App. 4a. The provision in No. 04-1657 dates from an earlier version of the contract between OPM and the national Blue Cross Blue Shield Association and is worded differently. It has, however, the same import. See 04-1657 Resp. Br. 3 (petition stage).

05-200, sought reimbursement for the benefits it had provided to McVeigh, and McVeigh's estate agreed to place $100,000 in escrow pending litigation. On April 18, 2003, Empire commenced this action against McVeigh's estate in the United States District Court for the Southern District of New York, seeking a declaration that it is entitled to approximately $157,000 from McVeigh's recovery as reimbursement. 05-200 Pet. App. 3a.

b. The district court granted McVeigh's motion to dismiss for lack of subject-matter jurisdiction. 05-200 Pet. App. 54a-62a. The court ruled that "Empire's claims * * * require determinations regarding the respective rights and obligations of two private parties to the health insurance contract at issue." *Id.* at 59a. The court rejected Empire's claim that federal common law governs the FEHBA contract, holding that "the only federal interest Empire identifies is the potential recovery by the United States Treasury of any reimbursement paid by the McVeigh estate to Empire," and that the only "significant conflict" between state law and a federal interest identified by Empire is "that the mere act of applying state law will * * * undermine the federal interest in uniformity." *Id.* at 59a-60a. The court rejected Empire's arguments that the Statement of Benefits itself created "federal law," *id.* at 60a, and that FEHBA's preemption provision preempted any state law that would otherwise be applicable, *id.* at 61a-62a.

c. The court of appeals affirmed. 05-200 Pet. App. 1a-45a. Noting that "FEHBA does not provide a federal statutory cause of action" applicable to this case, the court stated that "federal jurisdiction exists over this dispute only if federal common law governs Empire's claims." *Id.* at 5a. Adopting the test from *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 507 (1988), the

court stated that federal common law would be applicable only if "the operation of state law would (1) significantly conflict with (2) uniquely federal interests." 05-200 Pet. App. 6a (internal quotation marks and brackets omitted). The court decided that it "need not address" whether there are "uniquely federal interests" at stake in this case because "Empire has failed to demonstrate that the operation of New York state law creates 'an actual, significant conflict' with those interests." *Id.* at 6a-7a. Although the court noted "the possibility that at a later stage in the proceedings a significant conflict might arise between New York state law and the federal interests underlying FEHBA," the court found that possibility—and the consequent need to create federal common law to fill the gap —"insufficient to confer federal jurisdiction." *Id.* at 8a.

The court also rejected the contention that federal jurisdiction "exists pursuant to FEHBA's preemption provision." 05-200 Pet. App. 10a. The court held that, under FEHBA's preemption provision, "[t]he federal law preempting state law may be federal common law or the FEHBA statute provisions themselves, but it must be law—not [FEHBA] contract terms." *Id.* at 14a.[3] The court concluded that no preemption occurs here, because FEHBA preempts only state laws that "relate[] to health insurance or plans," 5 U.S.C. 8902(m)(1), and there was no showing that the dispute in this case "im-

[3] The court originally adopted that view driven by what it perceived to be "serious constitutional problems" that would be raised if FEHBA contract provisions could preempt state law. 05-200 Pet. App. 13a; see *id.* at 26a (Sack, J., concurring); *id.* at 35a-36a (Raggi, J., dissenting). On petition for rehearing, the court tempered that rationale, noting that its "discussion of the constitutional difficulties inherent in a literal reading of § 8902(m)(1) was not an essential component" of its ultimate conclusion. *Id.* at 49a.

plicates a specific state law or state common-law principle" that so relates. 05-200 Pet. App. 15a.

d. Judge Sack filed a concurring opinion identifying "several issues" discussed by the court "that I think we do not decide." 05-200 Pet. App. 25a. Judge Raggi dissented. *Id.* at 27a-45a. In her view, Section 8902(m)(1) "requires courts to construe or enforce any term in a FEHBA plan that relates to health insurance coverage or benefits by reference to uniform federal common law, not state law." *Id.* at 28a.[4]

3. *No. 04-1657.* a. Jose S. Cruz, an enrollee in the FEHBA plan administered by Blue Cross and Blue Shield of Illinois, was injured in a car accident in 1998. 04-1657 Pet. App. 1a-2a, 3a. Blue Cross paid approximately $4600 in benefits to Cruz as a result of his injuries. Cruz ultimately recovered $30,000 in settlement of a lawsuit against the tortfeasor, of which he paid $10,000 in attorney's fees. Blue Cross sought to collect the $4600 from Cruz, but Cruz contended that Blue Cross was entitled to less than $3121 under the state "common fund" doctrine, which Cruz asserted would have required Blue Cross to shoulder some of the attorney's fees. *Id.* at 3a.

In October 2000, Cruz brought an individual and class-action suit in state court against Blue Cross, asserting various claims under the state "common fund" doctrine. 04-1657 Pet. App. 19a-20a. Blue Cross removed the action to federal court, but the district court ordered it remanded for lack of subject matter jurisdic-

[4] The government filed an amicus brief in support of the petition for rehearing and rehearing en banc in *McVeigh*. 05-200 Pet. App. 65a-79a. The panel issued an opinion denying rehearing, *id.* at 46a-51a, and denied rehearing en banc without opinion, *id.* at 52a-53a.

tion.[5] Blue Cross then filed its own action against Cruz in the United States District Court for the Northern District of Illinois, seeking reimbursement of the $4600 it had paid in benefits to Cruz. *Id.* at 4a.

b. The district court dismissed the case for lack of subject matter jurisdiction. 04-1657 Pet. App. 16a-31a. The court rejected Cruz's contention that the case "amounts to an 'improper review'" of the order remanding Cruz's previous case to state court. *Id.* at 22a. The court explained that, while the remanded case raised a claim under the Illinois common fund doctrine, the instant case is an effort to "seek[] liability against Cruz under federal common law for failure to reimburse [Blue Cross]." *Id.* at 23a. The court concluded, however, that federal common law does not govern Blue Cross's claim and that the case therefore presents no federal question. *Id.* at 26a-29a.

c. The court of appeals reversed. 04-1657 Pet. App. 1a-15a. Initially, the court agreed with the district court that this case is not an improper attempt to appeal the remand order in Cruz's earlier lawsuit. *Id.* at 5a. Moreover, the court rejected Cruz's argument that, because FEHBA expressly confers jurisdiction on federal district courts for actions against the United States under the Act, 5 U.S.C. 8912, it must be read to foreclose actions by FEHBA carriers against enrollees or beneficiaries. *Id.* at 6a. It rejected as well Cruz's argument that this would be a proper case for abstention under *Colorado River Water Conservation District* v. *United*

[5] The government has filed a Statement of Interest in the state-court litigation, arguing, *inter alia*, that Cruz's state-law claims are preempted under 5 U.S.C. 8902(m), and that federal law governs construction of a FEHBA contract.

States, 424 U.S. 800, 818 (1976). 04-1657 Pet. App. 12a-14a.

The court held that there is federal-question jurisdiction in this case because "the FEHBA-created contract provision in the Statement of Benefits preempts state law with respect to reimbursement for benefits paid to Cruz," 04-1657 Pet. App. 15a, and, "with state law preempted," the court was required "to fill in [FEHBA's] interstices with federal common law," *id.* at 12a. The court noted that FEHBA's preemption provision "dictates that the contract terms trump state law when they relate to the nature, provision, or extent of coverage or benefits including payments with respect to benefits." *Id.* at 8a-9a. The court concluded that state laws governing reimbursement do so relate. Applying such laws, the court reasoned, would undermine the statutory goal of uniformity, because "[f]ederal employees in different states would have different reimbursement obligations and hence different net benefits." *Id.* at 10a. Moreover, "[t]he cost-savings goal of Congress would also be thwarted, because reimbursements from enrollees end up in the federal fund used to pay FEHBA plan premiums." *Ibid.*

DISCUSSION

In these two cases, the Second and Seventh Circuits reached diametrically opposed conclusions on whether the federal courts have jurisdiction over a suit by a FEHBA insurance carrier to obtain reimbursement from a FEHBA participant. The conflict in the circuits is also reflected in a decision of the Eighth Circuit, which has agreed with the Seventh Circuit's conclusion, and the question can be expected to arise in the future in those and other circuits. An important premise of the

FEHBA program is that the benefits and terms of FEHBA health plans for federal employees should be nationally uniform. The circuit conflict not only threatens the achievement of that goal, but also calls into question the ability of the federal courts to exercise jurisdiction over cases involving the interpretation of government contracts involving federal employees—a matter of considerable importance more generally. Accordingly, further review is warranted. Although the Court could grant review in both cases and consolidate them, the *McVeigh* case appears to provide a more suitable vehicle for review.

A. The Availability Of A Federal Forum For FEHBA-Related Reimbursement Actions Is A Question That Merits Review

1. These two cases arise from remarkably similar facts. Both cases involve enrollees in the Service Benefit Plan, a FEHBA plan, who were involved in accidents and received medical benefits from their plans on account of their injuries. In both cases, the enrollees advanced tort claims against the parties who caused the accidents and ultimately received funds in settlement of their claims. The plan's right to reimbursement in both cases was governed by a Statement of Benefits that provided for reimbursement "in full for benefits [the plan] paid" in the event of a recovery by the enrollee against a third party. See 05-200 Pet. App. 4a n.2; see also 04-1657 Pet. App. 3a ("Plan has the right to recover payments the Plan has made."). The Statement of Benefits is incorporated into and made a part of the contract between OPM and Blue Cross. See note 1, *supra*. Other provisions in the contract provide that Blue Cross must make a "reasonable effort to seek recovery of amounts

* * * it is entitled to recover in cases which are brought to its attention," 05-200 Pet. 5; see 04-1657 Resp. Br. 4 (petition stage), and to "subrogate under a single, nation-wide policy to ensure equitable and consistent treatment for all Members under the contract." 05-200 Pet. 5; see 04-1657 Resp. Br. 4 (petition stage). In both cases, the enrollees did not reimburse the Service Benefit Plan for any of the medical benefits they had received. In both cases, the Plan brought suit to recover the funds due.

Faced with those virtually identical cases, the Seventh Circuit held that "[t]he district court has federal question subject matter jurisdiction over this case under 28 U.S.C. § 1331," 04-1657 Pet. App. 15a, while the Second Circuit "affirm[ed] the district court's dismissal of the action for lack of subject matter jurisdiction" under Section 1331. 05-200 Pet. App. 2a. Indeed, the Second Circuit was informed of the Seventh Circuit's decision in *Cruz* in a petition for rehearing and issued a supplementary opinion in which it expressly "note[d] [its] disagreement with the conclusions reached in * * * *Cruz*." *Id.* at 50a. The Seventh Circuit was informed of the Second Circuit's decision in *McVeigh* in a petition for rehearing en banc, but the court, after calling for a response, denied the petition.

Nor is the circuit conflict confined to the Second and Seventh Circuits. *MedCenters Health Care* v. *Ochs*, 26 F.3d 865, 867 (8th Cir. 1994), involved a fact-pattern virtually identical to the facts of these cases, in which an enrollee suffered injuries, received FEHBA benefits as a result of those injuries, obtained a recovery from a third party, and declined to reimburse the FEHBA plan. The plan brought an action in federal court to obtain reimbursement. Faced with a challenge to the district

court's exercise of jurisdiction, the court of appeals reached the same result as did the Seventh Circuit in *Cruz*, concluding that "the District Court properly exercised its authority to decide this case." *Ibid.*

2. Petitioner in *Cruz* asserts (Pet. 11) that *Botsford* v. *Blue Cross & Blue Shield of Montana*, 314 F.3d 390 (9th Cir. 2002), amended on reh'g, 319 F.3d 1078 (9th Cir. 2003), *Goepel* v. *National Postal Mail Handlers Union*, 36 F.3d 306 (3d Cir. 1994), cert. denied, 514 U.S. 1063 (1995), and *Howard* v. *Group Hospital Service*, 739 F.2d 1508 (10th Cir. 1984), are also implicated in the conflict in the circuits. Although the analysis in those cases touches on some of the legal issues presented here, each of the cited cases, as well as *Caudill* v. *Blue Cross & Blue Shield of North Carolina*, 999 F.2d 74 (4th Cir. 1993), arose from suits for benefits under a FEHBA plan by an enrollee or beneficiary against a FEHBA carrier, rather than, as here, suits for reimbursement by a FEHBA carrier under the contract against the enrollee. In *Botsford* and *Caudill*, the court held that federal-question jurisdiction was present, while in *Goepel* and *Howard*, the court held that it was not.[6]

Although the law was unsettled at the time most of those FEHBA benefits cases arose, it is now clear that

[6] The jurisdictional analysis in the cited cases may have been affected by the fact that the plaintiffs in those cases generally were attempting to plead state-law, not federal, claims. Under the well-pleaded complaint rule, it is possible that a particular claim may be outside federal jurisdiction (if pleaded by a party such as the enrollees or beneficiaries in those cases seeking only to invoke state law), while a closely related claim may be within federal jurisdiction (if pleaded by a party such as the FEHBA carriers in these cases seeking to invoke federal law). See *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 399 (1987). Accordingly, the conflict among those cases does not necessarily implicate the conflict between *Cruz*, *McVeigh*, and *Ochs*.

FEHBA enrollees or beneficiaries who challenge a denial of benefits under a FEHBA plan must sue OPM itself—not the carrier—in a suit under the Administrative Procedure Act.[7] There is undoubtedly federal-question jurisdiction over such a suit. See *Botsford*, 314 F.3d at 398 ("FEHBA allows beneficiaries to sue the only employer and plan administrator involved in FEHBA: the United States.").[8] Accordingly, the question that arose in cases such as *Botsford*, *Caudill*, *Goepel*, and *Howard*, concerning whether there is federal jurisdiction over a claim by an enrollee or beneficiary for benefits under a FEHBA plan is unlikely to arise in future cases.

There has been no change in the law, however, that would affect federal jurisdiction in FEHBA reimbursement cases, such as the instant cases and *Ochs*. Cases such as these can be expected to arise with considerable frequency in the future. It is not uncommon for FEHBA participants, as for others who have access to a third-

[7] OPM amended the regulations to provide for suit against OPM, rather than against the insurance carrier, in 1995. See 60 Fed. Reg. 16,039 (1995) (amending 5 C.F.R. 890.107 to clarify that suit must be brought against OPM); see also *Muratore* v. *OPM*, 222 F.3d 918, 920 (11th Cir. 2000); *Bryan* v. *OPM*, 165 F.3d 1315 (10th Cir. 1999); *Burgin* v. *OPM*, 120 F.3d 494 (4th Cir. 1997).

[8] Petitioner in *Cruz* mistakenly contends (Pet. 11) that *Botsford* "squarely conflicts" with the Seventh Circuit's decision in *Cruz*. *Botsford* held that the construction of a FEHBA contract is necessarily governed by federal law. See 314 F.3d at 395 ("[A]pplication of state laws in cases involving denials of or disputes over benefits would undermine congressional intent.") *Botsford* therefore agreed with the Fourth Circuit's decision in *Caudill*, and the holdings in both cases are generally consistent with the Seventh Circuit's holding in *Cruz*. *Goepel* and *Howard* found no federal jurisdiction in a similar context, and the holdings in those cases are therefore generally consistent with the Second Circuit's decision in *McVeigh*.

party source of payment for medical expenses, to obtain payments for medical expenses caused by accident-related injuries and then recover from a tortfeasor for those same injuries. Cf., *e.g.*, *Arkansas Dep't of Health & Human Servs.* v. *Ahlborn*, cert. granted, No. 04-1506 (Sept. 27, 2005) (Medicaid); *Sereboff* v. *Mid Atlantic Med. Servs.*, cert. granted, No. 05-260 (Nov. 28, 2005) (ERISA plan). Three circuits—two of them very recently—have taken a position on the ability of a FEHBA carrier to enforce its reimbursement provision in those circumstances in federal court, and the question can be expected to continue to arise in the future. The conflict in the circuits creates a disuniformity in an area in which Congress intended a uniform nationwide scheme. Accordingly, further review is warranted.

B. The Seventh Circuit Correctly Concluded That A Federal Forum Is Available

The Seventh Circuit in *Cruz* correctly concluded that there is federal-question jurisdiction over a suit by a FEHBA carrier for reimbursement of benefit payments, and the Second Circuit in *McVeigh* accordingly erred. Federal jurisdiction rests on two bases.

1. First, federal jurisdiction is present because a suit to enforce a FEHBA contract necessarily sets forth a federal claim. This Court held in *Jackson Transit Authority* v. *Local Division 1285*, 457 U.S. 15, 22 (1982), that because the federal statute at issue there contemplated collective-bargaining agreements between unions and local transit authorities that received federal grants, "it is reasonable to conclude that Congress expected * * * the collective bargaining agreement, like ordinary contracts, to be enforceable by private suit upon a breach." *Id.* at 20-21. Similarly here, because FEHBA contemplates contracts between OPM and insurance

carriers that are also binding on enrollees and beneficiaries, it is reasonable to conclude that Congress expected the contracts to be enforceable by suit upon a breach. The only remaining question is whether such contract actions set forth federal, rather than state, claims. See *id.* 21. Here, the pervasively federal character of the relationship established by federal statute makes clear that federal, rather than state, law governs.

The Court explained in *Jackson Transit* that "suits to enforce contracts contemplated by federal statutes may set forth federal claims and * * * private parties in appropriate cases may sue in federal court to enforce contractual rights created by federal statutes." 457 U.S. at 22 (citing, *inter alia*, *Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682 (1963); *Norfolk & Western R.R.* v. *Nemitz*, 404 U.S. 37 (1971); *American Surety Co.* v. *Schulz*, 237 U.S. 159 (1915)). Such suits set forth federal claims if Congress intended the contracts to be "creations of federal law" and "that the rights and duties contained in those contracts be federal in nature." 457 U.S. at 23.[9]

A FEHBA contract is undoubtedly a "creation[] of federal law." See 5 U.S.C. 8902(a). The FEHBA carriers in these cases are suing to enforce provisions of FEHBA contracts, to which the government is a party and in which the government has a substantial financial interest. Cf. *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 504 (1988) ("[O]bligations to and rights of the United States under its contracts are governed exclusively by federal law."). The suits were undertaken pursuant to

[9] As the Court explained in *Jackson Transit*, the question in this context is not whether Congress conferred an implied private right of action, "but whether Congress intended such contract actions to set forth federal, rather than state, claims." 457 U.S. at 21.

the carriers' express contractual obligation to the government to enforce those specific provisions. Moreover, nationwide uniformity is a core purpose of the federal program. In these circumstances, it is clear that Congress intended that the "rights and duties contained in those [FEHBA] contracts be federal in nature." *Jackson Transit*, 457 U.S. at 23.

That conclusion is confirmed by FEHBA's preemption provision, which provides that "[t]he terms of any contract under [FEHBA] which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law * * * which relates to health insurance or plans." 5 U.S.C. 8902(m)(1). Terms in FEHBA contracts that provide for reimbursement "relate to the nature, provision, or extent of * * * benefits (including payments with respect to benefits)," because they provide that the enrollee must return payments for benefits to the carrier under certain circumstances. Moreover, state laws that would govern the reimbursement available to a FEHBA carrier "relate[] to health insurance or plans." Because state law on such subjects therefore is preempted, it follows that these subjects must be governed by *federal* law, including FEHBA, the contracts with carriers that in turn bind enrollees and beneficiaries, and federal common law where necesary to fill in interstices. The suits contemplated by Congress to enforce a contract between OPM and a carrier therefore necessarily arise under federal law for purposes of the district courts' jurisdiction under 28 U.S.C. 1331.

In *Jackson Transit* itself, the Court concluded that the relevant contract was not governed by federal law, but the opposite is true here. The Court in *Jackson*

Transit observed that, although the contract in that case between the local transit agency and its employees' union was mandated by federal law, the "statutory language provide[d] no definitive answer" to the question whether Congress intended that the rights and duties under that contract be controlled by federal law. 457 U.S. at 24. Reviewing the legislative history, however, the Court found a "consistent theme" that "Congress intended that labor relations between transit workers and local governments would be controlled by state law." *Ibid.* Accordingly, the Court held that a suit to enforce the contract did not present a federal question. In this case, by contrast, the federal government is a party to the contract, the federal interest and involvement in the contract are far stronger than in *Jackson Transit*, and there is nothing in the FEHBA statute or legislative history cutting the other way. To the contrary, FEHBA's preemption provision makes clear that Congress intended federal law to govern, and the legislative history shows that one of the purposes of the broadening of that provision in 1998 was to reinforce the basis for having disputes resolved in federal court. See p. 4, *supra*. Under the *Jackson Transit* analysis, therefore, there is federal-question jurisdiction over these cases.

2. Second, jurisdiction under 28 U.S.C. 1331 would lie even over a state-law contract action seeking reimbursement here, because a federal question would be a necessary and disputed ingredient. This Court explained in *Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Manufacturing*, 125 S. Ct. 2363, 2368 (2005), that federal-question jurisdiction will lie over a state-law cause of action if the "state-law claim necessarily raise[s] a stated federal issue, actually disputed

and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." See *Chicago* v. *International College of Surgeons*, 522 U.S. 156 (1997); *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180 (1921). Thus, even if the carrier's suits in *Cruz* and *McVeigh* rested only upon state-law causes of action, it would nonetheless remain true that the construction and application of the FEHBA contract itself and its reimbursement provisions—essential ingredients in any such state-law cause of action—are matters of federal law; that those matters are "actually disputed" (because the enrollee presumably does not concede his liability for reimbursement in the amount sought); and that recognizing the federal nature of the claim would not alter any congressionally approved balance between federal and state courts (because there is no basis for believing that Congress intended that state courts alone would adjudicate disputes arising under FEHBA contracts). Accordingly, under *Grable*, federal jurisdiction would lie in these cases, even if the FEHBA carriers' claims necessarily rested on state-law causes of action.

C. The Second Circuit's *McVeigh* Case Provides The Better Vehicle For Review Of This Question

Because both *Cruz* and *McVeigh* present the question whether there is federal jurisdiction in very similar factual settings, the Court could grant review in either case. The Court could also grant review in both cases, although the similarity between them suggests that doing so would be unnecessary. The best course would appear to be to grant the petition in *McVeigh*, which appears to be the better vehicle, and hold *Cruz* for disposition in light of the decision in *McVeigh*. The *Cruz* case involves an unusual situation involving parallel

state litigation, which could be argued to raise additional issues that are not independently worthy of plenary review. See 04-1657 Pet. i (question presented includes reference to "where a state court action was already proceeding on the issue").[10] *McVeigh* does not involve that additional complication, and it would therefore appear to be the better vehicle for resolution of the question presented.

CONCLUSION

The petition for a writ of certiorari in No. 05-200 should be granted. The petition in No. 04-1657 should be held and then disposed of as appropriate in light of this Court's decision in No. 05-200.

Respectfully submitted.

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[10] In addition, the petitioner in *Cruz* argued to the court of appeals that the case was an improper attempt to appeal the earlier order rejecting the removal of petitioner's case from state court and remanding it back to that court. 04-1657 Pet. App. 5a; see 28 U.S.C. 1447(d). The court of appeals correctly rejected that argument, and petitioner has not renewed it in this Court. 04-1657 Pet. App. 5a.